

## **APPENDIX A**

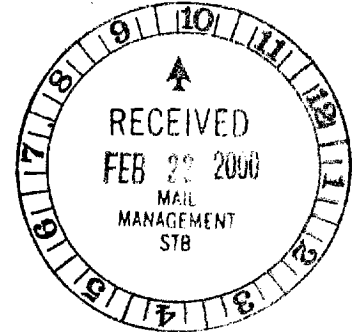


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, Washington 98101

February 17, 2000

Reply To  
Attn Of: ORC-158

Vernon A. Williams  
Surface Transportation Board  
Office of the Secretary, Room 711  
1925 K Street NW  
Washington, DC 20423-0001  
Attn: Phillis Johnson-Ball



ENTERED  
Office of the Secretary

FEB 23 2000

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Public Record

Re: Docket No. AB-33 (Sub No. 70)

Dear Ms. Johnson-Ball:

EPA appreciates this opportunity to review and comment on the Draft Supplemental Environmental Assessment ("Draft Supplemental EA") prepared as part of the proceeding referenced above. Previously in this proceeding, the Surface Transportation Board (or its predecessor, the Interstate Commerce Commission), established six environmental conditions that Union Pacific Railroad would have to meet before it would be granted final approval to salvage the Wallace Branch rail lines through northern Idaho. After reviewing the Draft Supplemental EA, and the appended materials, EPA generally concurs with the preliminary conclusions stated by the Section of Environmental Analysis (SEA). This letter provides EPA's comments concerning Union Pacific's satisfaction of the six environmental conditions and other issues raised by the Draft Supplemental EA.

A. Satisfaction of Six Environmental Conditions

The conclusion that five environmental conditions have been satisfied by Union Pacific appears thoroughly supported in the materials provided to and cited by the SEA. The Draft Supplemental EA proceeds to conclude preliminarily that the sixth environmental condition, involving historic preservation, "has not yet been satisfied." Draft Supplemental EA at ES-4, n.7; p.36. The Draft Supplemental EA appears to recognize that Union Pacific has taken all steps it can to satisfy the sixth environmental condition. However, the SEA indicates that, consistent with comments from the State Historic Preservation Office, it cannot make any conclusion on satisfaction of the sixth condition until the future use of the right-of-way as a recreational trail is confirmed. The future use of the right-of-way as a recreational trail cannot be confirmed until a CITU is granted by the STB under the Trails Act, 16 U.S.C. 1247(d). The STB, however, has stated that it will not rule on any Trails Act request until it issues a final decision in this proceeding to approve salvage. However again, the STB may be prevented from approving

salvage until the six environmental conditions, including historic preservation, have been satisfied. The result could be circular gridlock.

As EPA reads the Draft Supplemental EA, the SEA seeks to avoid this Catch-22 by recommending that the STB adopt a modified Environmental Condition No. 6. By modifying this condition, the STB could find that the six environmental conditions, as modified, have been fully satisfied, thereby allowing the STB to conclude this proceeding by approving final salvage. Following approval of salvage, the STB could then proceed to issue a ruling on the Trails Act request. If this ruling provides for grant of a CITU, then the historic preservation process would be concluded with no further action by the STB. Draft Supplemental EA at 36. If EPA's understanding of the SEA recommendation to the STB is accurate, then EPA supports this recommendation, and urges that the STB act promptly to issue a modified Environmental Condition No. 6 and approve salvage accordingly.

#### B. Application of CERCLA Section 121(e) Permit Exemption

Section 121(e)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides that "No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite. . . ." The Draft Supplemental EA seems to recognize that this statutory provision relieves railroads of the requirement to obtain STB approval for salvage activities within Superfund sites if such actions are conducted as remediation actions. See Draft Supplemental EA at ES-1, n.2; p.6, n.14. Application of CERCLA Section 121(e)(1) is not, however, limited to Superfund sites on the National Priorities List, nor is it limited to cleanup activities constituting remedial actions.

Section 121(e)(1) explicitly applies to "any removal or remedial action." Remedial actions are defined as "actions consistent with permanent remedy taken instead of or in addition to removal actions." CERCLA Section 101(24). Removal actions are generally early actions designed to "prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." CERCLA Section 101(23). The cleanup activities evaluated through EPA's January 1999 EE/CA and October 1999 Action Memorandum constitute removal actions. Implementation of these actions will prevent, minimize, or mitigate exposures of railroad right-of-way contaminants to humans and the environment, without necessarily representing permanent remedies for such contamination. Preparation of an EE/CA is required for removal actions considered "non-time critical." National Contingency Plan (NCP) at 40 C.F.R. Part 300.415(b)(4)(i); Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA (EPA, 1993). The EE/CA for the Wallace Branch railroad right-of-way was conducted in accordance with NCP requirements and EPA's guidance, as acknowledged by the SEA. Draft Supplemental EA at 12.

The Draft Supplemental EA appears to acknowledge that STB approval was not required for salvage activities conducted as remedial actions within the area known as the Bunker Hill Superfund Site (BHSS), pursuant to CERCLA Section 121(e)(1). Draft Supplemental EA at ES-1, 6. The same statutory provision supports a similar conclusion for removal actions

conducted along the Wallace Branch railroad right-of-way. As noted above, Section 121(e)(1) is not limited to remedial actions, but explicitly applies also to removal actions such as the one identified in the EE/CA and Action Memorandum for the Wallace Branch right-of-way.

Moreover, Section 121(e)(1) is not limited to designated "Superfund Sites" or areas otherwise connected with the National Priorities List (NPL). Section 121(e)(1) applies to "any" removal or remedial actions conducted entirely "onsite." "Onsite" is defined by the NCP, EPA's promulgated regulations implementing CERCLA, to mean "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. Part 300.400(e)(1). The areal extent of contamination identified in the EE/CA includes the entire length and breadth of the railbed, as well as associated loading areas and siding areas within the Wallace Branch right-of-way. Therefore, these areas and others identified in the EE/CA and Action Memorandum qualify as "onsite" according to the NCP definition.

Because the activities identified in the Wallace Branch right-of-way EE/CA and Action Memorandum constitute "removal or remedial actions conducted entirely onsite," these actions are subject to CERCLA Section 121(e)(1). Consistent application of CERCLA Section 121(e)(1) thus requires that the removal actions identified in the Wallace Branch EE/CA and Action Memorandum, like the remedial actions within the BHSS, do not require the STB's approval as salvage activities. As such, even without STB approval of salvage for the Wallace Branch, EPA believes that Union Pacific may still proceed to implement the removal actions, including salvage activities, selected through the CERCLA process and specified in the Consent Decree negotiated by the United States, State of Idaho, Coeur d'Alene Tribe, and Union Pacific.

In any event, EPA believes that the STB should proceed promptly to rule on the Trails Act request of the Coeur d'Alene Tribe and State of Idaho, granting the State and Tribe, or their designated entities, a CITU to facilitate the future use of the right-of-way as a recreational trail. If the CITU is not issued, EPA may need to revisit its Streamlined Risk Assessment to determine whether the selected removal actions would still protect human health given possibly different land uses and exposure patterns.

### C. Other Issues

1. "EE/CA" is an abbreviation for "Engineering Evaluation/Cost Analysis," see 40 C.F.R. Part 300.415(b)(4)(i), not "Environmental Evaluation/Cost Analysis," as reported in the Draft Supplemental EA at ES-2 *passim*.

2. EPA is conducting a more comprehensive risk assessment for the Coeur d'Alene area as part of the Bunker Hill Basin-wide Remedial Investigation/Feasibility Study. Contrary to the statement in the Draft Supplemental EA at 27, this Basin-wide study ranges well beyond the bounds of the BHSS, which has been defined as an approximately 21-square mile area centered around the former Bunker Hill mine near Kellogg, Idaho.

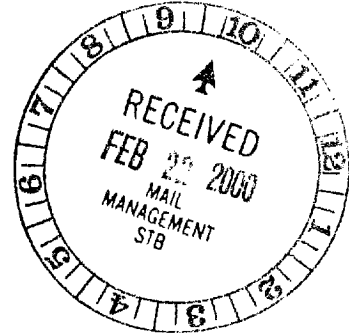


## COEUR D'ALENE TRIBE

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(208) 686-1800 • Fax (208) 686-1182

February 18, 2000

REFERENCE:



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1925 K. Street, N.W.  
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Attn: Phillis Johnson-Ball

ENTERED  
Office of the Secretary

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Re: Union Pacific Railroad Company - Abandonment -  
Wallace Branch, Idaho, STB Docket No. AB-33 (Sub-No. 70)

The Coeur d'Alene Tribe ("Tribe") submits these comments on the Draft Supplemental Environmental Assessment (Draft Supp. EA) issued by the Surface Transportation Board (STB) Section of Environmental Analysis (SEA) on January 17, 2000. The Tribe appreciates the opportunity to comment on the Draft Supp. EA and commends the effort by the SEA. The Tribe has reviewed the Draft Supp. EA, its appendices and supporting documentation. The Tribe concurs with the conclusion in the Draft Supp. EA that the STB has sufficient information to complete the environmental analysis and conditions required and approve final salvage of the Wallace Branch rail line.

The United States, State of Idaho, Coeur d'Alene Tribe and Union Pacific ("UP") have undertaken extensive analysis, consultation and cooperation to meet the environmental conditions required for final salvage of the Wallace Branch. This effort, over more than a five year period, resulted in a Consent Decree among these parties which was filed in federal court December 23, 1999. The Consent Decree will provide for an extensive, environmentally protective response action which includes construction and maintenance of a public trail.

The Tribe submits the following comments regarding the historic preservation condition.

### The Historic Preservation Condition

The SEA recommends that the STB impose a modified Section 106 condition on any decision approving salvage. Draft Supp. EA at p. 36, 37. The proposed condition provides that until the Board rules on any pending requests for a certificate of Interim Trail Use ("CITU") under the Trails Act, 16 U.S.C. 1247(d), UP shall retain its interest in and take no steps to alter the historic integrity of all structures, including the rail line itself, that are 50 years old or older to allow completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f. Draft Supp. EA at p. 37.

As provided in the Consent Decree, the trail is an essential and substantial component of the environmental remedy proposed for the Wallace Branch. Implementation of this remedy through construction of the trail is contingent upon issuance of the CITU by the STB final ruling on salvage requires satisfaction of the six environmental conditions. These conditions cannot be met unless the trail is built. The Idaho State Historic Preservation Office (SHPO) finds that abandonment without conversion to a recreation trail would constitute adverse effect under the National Historic Preservation Act. Draft Supp. EA at p. 35 and Appendix B-6.

One of the historic properties on the Wallace Branch is the Chatcolet Bridge. The bridge is located within the Coeur d'Alene Indian Reservation situated on tribal lands as it crosses the southern end of Lake Coeur d'Alene. A cultural resource report was submitted by UP to the SHPO in February, 1999. The SHPO submitted comments on the report February 18, 1999. Preliminary engineering feasibility and cost data on the swing bridge was obtained by the Tribe late in the negotiation of the Consent Decree. Based on this data, the Tribe questions the feasibility of renovating, operating and maintaining the swing bridge in perpetuity. In the Consent Decree negotiations the Tribe raised these concerns regarding the bridge and sought feasible alternatives to bridge operation.

In November 1999, the Tribe notified the SHPO of its concerns regarding the swing bridge and the Tribe's intent to evaluate feasible bridge management alternatives within the context of the Consent Decree negotiations. The SHPO sought to ensure the Tribe would evaluate any feasible options that could keep the swing bridge intact.

On December 23, 1999, facing a court imposed deadline, the Consent Decree was filed by the parties in federal court. In the Consent Decree, the Tribe is provided an election to operate the swing span bridge or have UP replace it with a fixed span.

In an attempt to explore alternatives, the Tribe requested an expanded evaluation and analysis of bridge management options. This report is nearing completion and expected to be available by the end of February, 2000. The Tribe notified the SHPO of this report and will make it available to the SHPO upon completion. The Tribe, UP and the SHPO will review this report to assess the feasibility of any alternatives to management of the Chatcolet Bridge.

The potential for a mitigation agreement regarding historic properties is clearly contemplated. The SHPO states that "[A]bandonment without conversion to a recreational trail will constitute an *adverse effect* on the National Register eligible property. If this option is selected, a Memorandum of Agreement on mitigation will have to be developed...." Draft Supp. EA, Appendix B-6.

Vernon A. Williams  
February 18, 2000  
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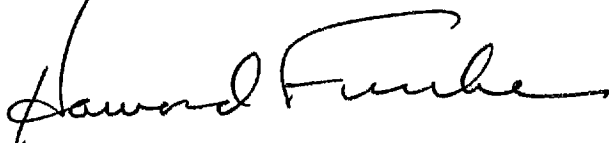
It appears, SHPO intends to render a decision on adverse effect following a final decision on salvage and issuance of a CITU. "We will provide final comments on effect as soon as we are notified of Surface Transportation Board and UP's final plans for the rail line." Draft Supp. EA, Appendix B-6.

In summary, the trail is essential to the overall environmental remedy. Without the trail the environmental conditions cannot be satisfied. Data developed near the end of negotiation of the Consent Decree **create** numerous questions regarding feasibility and cost of swing bridge operation. Alternative bridge operation strategies are being analyzed and will be discussed. The potential for a mitigation agreement has been contemplated from the outset, and a decision on adverse effect was not intended until after final ruling of the STB.

In light of the foregoing, the Tribe requests clarification of Condition 6 to provide that if the historical integrity of the eligible properties could be adversely affected by abandonment salvage, then UP will not take any actions with respect to them until an appropriate agreement is reached with the SHPO.

The Tribe appreciates your consideration of its comments on this important matter.

Very truly yours,

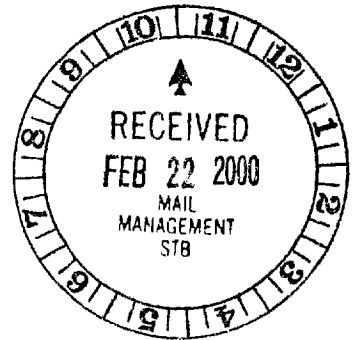
A handwritten signature in black ink, appearing to read "Howard Funke", with a stylized, flowing script.

Howard Funke  
Tribal Attorney  
Coeur d'Alene Tribe



**STATE OF IDAHO**  
OFFICE OF THE ATTORNEY GENERAL  
ALAN G. LANCE

February 18, 2000



Vernon A. Williams  
Surface Transportation Board  
Office of the Secretary, Room 711  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Attn: Phillis Johnson-Ball

Re: UNION PACIFIC RAILROAD COMPANY  
-ABANDONMENT-  
WALLACE BRANCH, IDAHO  
STB DOCKET NO. AB-33 (Sub-No.70)

**ENTERED**  
**Office of the Secretary**

**FEB 23 2000**

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**Public Record**

The State of Idaho, Division of Environmental Quality (IDEQ) and Department of Parks and Recreation (IDPR) (collectively, "State") submit the following comments on the Draft Supplemental Environmental Assessment (DSEA) issued by the Surface Transportation Board (STB) Section of Environmental Analysis (SEA) on January 7, 2000. The State of Idaho has reviewed the DSEA and Appendices thereto and concludes, consistent with the DSEA, the STB has sufficient information to complete the environmental analyses and conditions required by State of Idaho, et al. V. ICC, 35 F.3d 585 (D.C. Cir. 1994) and the subsequent Decision of the Interstate Commerce Commission (ICC) on November 28, 1994 (Docket No. AB-33 (Sub-No.70)) and approve final salvage of the railroad line known as the Wallace-Mullan Branches (Wallace Branch).

The State reaffirms and incorporates herein the joint May 20, 1999 letter to the STB by the United States (including federal natural resource trustees and the Environmental Protection Agency (EPA)), State of Idaho and Coeur d'Alene Tribe (collectively "Governments") which summarizes the extensive consultation and cooperation by UP with the Governments to fully meet all environmental conditions required for final salvage of the Wallace Branch. In short, subsequent to the 1994 Court and ICC decisions referenced above, UP, in consultation and negotiation with the Governments, undertook extensive environmental sampling and analysis of the Wallace Branch which culminated in the development, review and approval by the



Governments of a thorough Engineering Evaluation/Cost Analysis (EE/CA) and the other documents, including the Track Salvage Work Plan, which have been submitted to the STB (and are appended to the DSEA). These documents are fully adequate to support a "hard look" at the environmental impact of salvage, a determination that salvage poses no significant impact to human health and the environment and that the six environmental conditions are satisfied.

The Governments and UP filed a Consent Decree on December 23, 1999 in United States and State of Idaho v. Union Pacific Railroad Co., Case No. CV 99-0606-N-EJL and Coeur d'Alene Tribe v. Union Pacific Railroad Co., Case No. CV 91-0342-N-EJL. Upon Court approval, the Consent Decree will obligate UP to perform response actions regarding the Wallace Branch, including salvage activities. The Consent Decree requires UP-- in compliance with all applicable federal, state and federal environmental laws and under oversight by the United States, State and Tribe-- to repair flood damage, perform salvage activities, implement and maintain extensive remedial measures within the right-of-way, construct the trail and amenities and take other related actions.

Consistent with the above comments, the State submits the following specific comments and recommendations regarding the DSEA as follows:

1. DSEA at ES-1, n.2. The DSEA correctly recognizes that performance of remedial actions within the Bunker Hill Superfund Site (BHSS) by Union Pacific, including the removal of track, did not require the approval of the ICC. As stated by the ICC Decision, November 28, 1994, Docket No. AB-33 (Sub-No. 70), "[CERCLA] section 121(e)(1) . . . relieves UP of the requirement to obtain permission for the Commission to remove the track if it does so in connection with remediation action carried out in compliance with CERCLA." In other words, due to the effect of section 121 of CERCLA, UP could remove tracks, at least temporarily, within the BHSS as part of a CERCLA response action without approval of the ICC. As the DSEA notes, UP has removed some track within the BHSS as part of its CERCLA remedial action obligations. UP has not completed its remedial action obligations regarding the right-of-way within the BHSS and has not received EPA and IDEQ certification of completion. In any case, the DSEA mischaracterizes the effect of CERCLA in stating that railroads are relieved from obtaining STB approval to abandon rail lines within Superfund Sites. CERCLA has no such broad effect; CERCLA simply authorizes response actions to proceed without need for other governmental authorizations. Accordingly, the last sentence of the footnote should be amended to accurately and specifically state the effect of CERCLA as recognized by the November 28, 1994 ICC decision as follows: "Pursuant to Section 121(e)(1), 42 U.S.C. 9261(e)(1), UP has removed track within the BHSS in connection with remediation actions carried out in compliance with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)."

2. DSEA at ES-2. Amend the second sentence of the first full paragraph to correctly name the EE/CA and clarify that the Governments, including the EPA, the State of Idaho and Tribe, jointly prepared, reviewed and approved the EE/CA as follows: "UP has submitted an extensive

Engineering Evaluation/Cost Analysis (EE/CA) that was prepared, reviewed and approved by the Governments.”

3. DSEA at ES-3. Amend the first sentence of the second full paragraph to indicate that the State of Idaho, as well as the EPA and the Tribe jointly prepared and issued responses to public comments as follows: “SEA has reviewed the EE/CA document, as well as the summary of the responses of the EPA, State and Tribe to the comments received during the public outreach sessions as part of the EE/CA process.”

4. DSEA at p.6, n.14. See comment 1 above. The first sentence of footnote 14 should be amended to accurately and specifically characterize the actions of UP within the BHSS pursuant to CERCLA as recognized by the November 24, 1994 ICC Decision as follows: “Pursuant to Section 121(e)(1), 42 U.S.C. 9621(e)(1), UP removed track within the BHSS in connection with remediation actions carried out in compliance with CERCLA.”

5. DSEA at p.11. Amend first sentence of subparagraph “(1)” to correct the title of the EE/CA and state that the EE/CA was jointly prepared, reviewed and approved by EPA, IDEQ and the Tribe as follows: “(1)An Engineering Evaluation/Cost Analysis (EE/CA) . . . and other technical documents including a Streamlined Risk Assessment, jointly prepared, reviewed and approved by EPA, IDEQ and the Tribe . . . .”

6. DSEA at p.12. Amend the third sentence of the second bullet to indicate IDEQ also prepared the responses to public comments as follow: “Responses to Comment were prepared by EPA, the Tribe, the IDEQ and the Idaho Department of Parks and Recreation in May 1999.”

7. DSEA at p.12. The Track Salvage Work Plan was reviewed and approved by the Governments and identifies and requires specific environmental controls which are enforceable by the Governments through federal, state and tribal environmental laws and, specifically, the Consent Decree. Accordingly, amend the first sentence of “(2)” as follows: “(2) A separate Track Salvage Work Plan, prepared by UP and reviewed and approved by the Governments, which requires specific environmental controls to be imposed on UP by the Governments in the removal of rail, track, ties, and other track materials on the Wallace Branch (assuming that the Board authorizes salvage).”

8. DSEA at p.13. Amend the first sentence of the second full paragraph to correct the date and action taken by EPA’s action memorandum and include reference to the State and Tribe concurrence as follows: “On October 13, 1999, EPA approved, with concurrence by the State and Tribe, an action memorandum concluding the EE/CA process and selecting the proposed removal action, which also has been submitted to SEA (attached as Appendix C-1).”

9. DSEA at p.14. EPA, IDEQ and the Tribe all have authorities under CERCLA and/or other federal, state or tribal environmental laws which bear on UP’s salvage of the Wallace Branch. UP consulted, negotiated and reached agreement with these entities to meet all applicable

environmental requirements and obligations. Accordingly, amend the first three sentences of the first full paragraph as follows: "EPA, IDEQ and the Tribe are the primary federal, state and tribal entities responsible for overseeing and implementing environmental requirements applicable to the right-of-way including those pertaining to releases or threatened releases of hazardous substances under CERCLA. UP consulted extensively with EPA, IDEQ and the Tribe (which prepared, reviewed and approved the EE/CA, the action memorandum, and other technical documents pursuant to CERCLA) as well as other governmental agencies to resolve environmental and natural resource damage concerns related to historical mine waste found within the right-of-way. UP submitted to SEA the EE/CA and the other technical documents approved by EPA, IDEQ and the Tribe, including a Streamlined Risk Assessment."

10. DSEA at p.20. References to the Consent Decree in the second full paragraph and footnote 24 should be updated to reflect filing of the Consent Decree on December 23, 1999 in United States and State of Idaho v. Union Pacific Railroad Co., Case No. CV 99-0606-N-EJL and Coeur d'Alene Tribe v. Union Pacific Railroad Co., Case No. CV 91-0342-N-EJL. The Consent Decree includes a Statement of Work and numerous technical documents including the Track Salvage Work Plan which, upon entry by the Court, will impose an extensively studied, thorough, environmentally protective and enforceable response action upon UP in salvaging the Wallace Branch and constructing a public trail.

11. DSEA at p.29. While the Streamlined Risk Assessment does indicate that potential excessive exposures could occur in remote areas after implementation of physical response actions, it also indicates such exposure can be effectively controlled through identified management actions which are part of the overall response action. Moreover, it is clear that such exposures exist in the absence of salvage and the response actions identified and required by the EE/CA and the Consent Decree. The first partial sentence at top of the page should be amended by adding "and those potential exposures can be effectively limited by management actions of the proposed response action."

12. DSEA at p. 29. The first full paragraph regarding ecological risk should be amended to state that salvage and associated response actions will decrease existing and future ecological risks by removing, containing and managing contaminants within the right-of-way.

13. DSEA at p. 31. Amend the first partial sentence at the top of the page by adding "State of Idaho" after "Tribe" and before "and."

14. DSEA at p. 32. Amend the second sentence of the second full paragraph to indicate the participation of the State and Tribe in the EE/CA as follows: "To demonstrate compliance with Environmental Condition No. 1, UP submitted the EE/CA which was prepared, reviewed, approved by EPA, IDEQ and the Tribe (the agencies responsible for implementation of federal, state and tribal environmental requirements, including CERCLA). Likewise amend the end of the third sentence of the second full paragraph as follows: "... and constitute the Government's determination of an appropriate response action under CERCLA and other appropriate federal,

state and tribal environmental laws and regulations for mine waste contamination found at various locations along the Wallace Branch." UP has exceeded the requirement of consultation with EPA and IDEQ. UP consulted with all the Governments and agreed to implement a comprehensive and fully enforceable response action, which includes salvage activities, to fully address all applicable federal, state and tribal environmental requirements.

15. DSEA at p. 37. The State agrees with the conditions recommended by the SEA. With regard to the recommended condition (No.3) concerning the National Historic Preservation Act, the State has consulted with the Tribe and UP and is aware of potential concerns regarding the Chatcolet swing bridge. The State agrees with the SEA analysis (DSEA at p.36) that Environmental Condition No. 6 will be satisfied upon issuance by the STB of a Certificate of Interim Trail Use (CITU). Thereafter, any changes to the Chatcolet swing bridge would require further consultation with the State Historic Preservation Office and compliance with NHPA but would not be a matter for further STB conditions or approval.

The State of Idaho appreciates the efforts of the SEA and this opportunity to comment on the DSEA. The looks forward to timely and coordinated actions by the STB to approve final salvage and impose a CITU for the Wallace Line.

Respectfully submitted

State of Idaho, Division of Environmental Quality and Department of Parks and Recreation

By  \_\_\_\_\_

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Encl. (Original and 10 copies)



Our mission: to educate through the identification, preservation, and interpretation of Idaho's cultural heritage.

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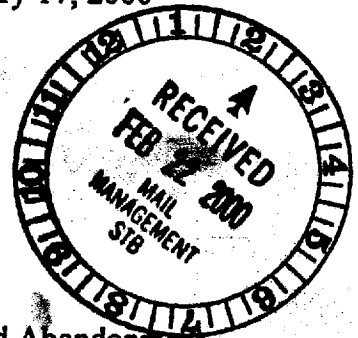
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February 17, 2000



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Mr. Vernon A. Williams  
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RE: Docket No. AB-33 (Sub No. 70) Union Pacific Railroad Abandonment,  
Wallace Branch, Idaho-Draft Supplemental Environmental Assessment

Dear Mr. Williams:

Thank you for requesting our views on the Draft Supplemental Environmental Assessment for Union Pacific's abandonment of the Wallace Branch in Benewah, Kootenai, and Shoshone counties, Idaho.

We agree with Surface Transportation Board's conclusion (page 36) that Environmental Condition No. 6 has not been satisfied and review under Section 106 of the National Historic Preservation Act has not been completed. We also strongly support the SEA recommendation (page 36) that Union Pacific retain its interest in the historic properties of the Wallace branch until Section 106 Review has been finalized.

Since 1989, our office has been reviewing this undertaking under Section 106 and implementing regulations 36CFR800. The first step of the review process (36 CFR 800.4) was finally completed in 1999, after Union Pacific contracted with a professional cultural resource consultant to identify historic properties along the railline. The rest of the 106 Review process, assessment of adverse effects (36CFR800.5) and resolving adverse effects (36CFR800.6), has not been completed.

Our response to the findings of the cultural resource report are found in our letter of February 18, 1999, and accurately summarized on page 35 of the draft EA. In our review, we recognized the Wallace Branch and associated buildings and structures as eligible for the National Register of Historic Places. We also agreed that six properties are individually eligible. Although we were not certain of the ultimate disposition of these properties at that time, we proposed that abandonment with conversion to a rails-to-trails project would result in *no adverse effect* on these historic properties, provided that all of the structures would be retained in place. We received no response to these recommendations.



The Idaho State Historical Society is an Equal Opportunity Employer.

Vernon A. Williams

February 17, 2000

page 2

As stated on page 9 of the draft EA, Union Pacific and a group of state and federal agencies and the Coeur d'Alene Tribe have been working together to resolve legal issues surrounding the Wallace Branch. This group concluded that all six environmental conditions have been met, including the condition on historic preservation. We disagree with this conclusion.

Our agency was not invited to participate in these discussions. We were notified of the existence of this group in a telephone conversation on November 19, 1999, and advised that their negotiations were drawing to a close. We were also notified that the historic swing bridge (Bridge #23.45) would be included in the portion of the line to be transferred to the Coeur d'Alene Tribe.

Bridge #23.45 is one of only two known swing-span bridges in the State of Idaho. The bridge clearly meets National Register of Historic Places Criterion A for its association with the history of railroad development in Idaho, and also Criterion C as a rare engineering design for the state. Its high degree of physical integrity and ability to convey an important part of Idaho's transportation history warrant its preservation.

In discussions with the Tribal attorney, we learned that recent engineering studies recommend removing the historic bridge and replacing it with a modern structure. The economic feasibility of long-term maintenance costs was cited as justification for the removal. This information leaves us very concerned about the fate of this bridge and other eligible structures along the line, even with a conversion to a recreational trail.

In light of this new information, we now consider the abandonment of the Wallace Branch as an *adverse effect* on historic properties. Surface Transportation Board should enter into consultation with our office first to discuss alternatives to avoid the adverse effect, and if avoidance cannot be guaranteed, to discuss measures to mitigate those effects.

At this point, we recommend conditions be placed on the transfer of the right-of-way to the State and Tribe that will ensure long-term preservation of the swing bridge and other historic structures along the line. Additionally, we feel that engineering studies should be conducted with bridge preservation as the ultimate objective. Therefore, additional studies should be conducted to examine project alternatives that will allow for retention of the bridge. For example, can the bridge be preserved in place and a movable structure installed elsewhere on the 3,120 foot long trestle? Such an alternative may be prove more cost effective overall and protect this important remnant of Idaho's past.

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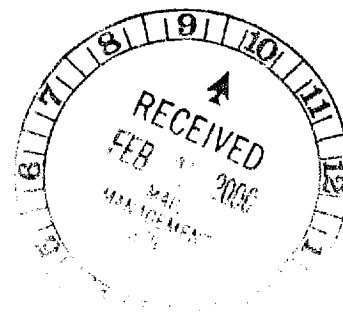
Vernon A. Williams  
Surface Transportation Board  
Office of the Secretary, Room 711  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Attn: Phillis Johnson-Ball

Re: UNION PACIFIC RAILROAD COMPANY – ABANDONMENT  
– WALLACE BRANCH, IDAHO, STB DOCKET NO. AB-33  
(Sub-No. 70)

These comments are submitted on behalf of Union Pacific Railroad Company (“Union Pacific”) on the Draft Supplemental Environmental Assessment (hereinafter the “Draft Supp.EA”) issued by the Surface Transportation Board Section of Environmental Analysis (hereinafter “SEA”) on January 7, 2000.

Union Pacific commends the efforts of the SEA and generally supports the Draft Supp. EA. As described in the Draft Supp. EA, Union Pacific and others have conducted extensive environmental studies and analyses on the Wallace-Mullan Branches. Union Pacific has carefully reviewed the Draft Supp. EA, the Appendices thereto and the supporting documentation. Union Pacific concurs with the conclusion in the Draft Supplemental EA that the Surface Transportation Board (hereinafter “STB” or “Board”) has sufficient information to complete the environmental analyses and conditions required by State of Idaho, et al. v. ICC, 35 F.3d 585 (D.C. Cir. 1994), and the subsequent decision of the Interstate Commerce Commission (hereinafter “ICC”) on November 28, 1994 and approve final salvage of the railroad line known as the Wallace-Mullan Branches (hereinafter “Wallace Branch”). As described below, Union Pacific requests clarification of two footnotes in the Draft Supp. EA and minor modifications to the historic preservation conditions proposed for abandonment and salvage of the Wallace Branch line.



Proper Scope of the SEA

Union Pacific fully supports SEA's determination that the Supplemental Environmental Analysis should be focused on the environmental effects of salvage operations of the Wallace Branch once final abandonment has been authorized by the Board. See Draft Supp. EA p. 38. Comments previously filed addressing issues unrelated to the salvage operations are subjects beyond the jurisdiction of the Board.

Opportunities for Public Comment Apart from the Draft Supp. EA

There have been, and continue to be, other opportunities for any comments unrelated to the environmental impacts of salvage. As reflected in the Draft Supp. EA, Union Pacific has entered into a Consent Decree with the United States, the State of Idaho and the Coeur d'Alene Tribe (the "Governments") in United States and State of Idaho v. Union Pacific Railroad Co., Case No. CV 99-0606-N-EJL, and Coeur d'Alene Tribe v. Union Pacific Railroad Co., Case No. CV 91-0342-N-EJL, (D. Idaho)(the "Consent Decree"). The Consent Decree was lodged with the United States District Court for the District of Idaho on December 23, 1999. Notice of the lodging was published in the Federal Register on January 20, 2000. Comments on the Consent Decree may be filed until February 22, 2000. The Consent Decree, and the attachments, reflect prior public comments as well as extensive negotiations among Union Pacific, the federal government, including the Department of Justice, the Environmental Protection Agency (hereinafter "EPA") and the Department of the Interior, the State and the Coeur d'Alene Tribe over a period of four years.

As detailed in the Draft Supp. EA, there were extensive public notice and comments relating to the Engineering Evaluation and Cost Analysis (hereinafter "EE/CA") which is the basis for the response actions selected by the Governments and reflected in the Consent Decree. There were a large number of public comments and a comprehensive response to those comments by the Governments. These suggestions and comments by the public affected the terms of the settlement agreement among Union Pacific and the Governments and the Consent Decree which incorporates that settlement agreement.

Importantly, the Consent Decree, together with the extensive attachments thereto, addresses, in detail the steps proposed for salvage of the rail line, response actions to address contamination within the right of way, as well as future obligations of Union Pacific, the State and the Tribe for long term maintenance and operation of the recreational trail proposed as part of the settlement. Because the Consent Decree comprehensively addresses all of the environmental issues related to the Wallace Branch, the comment process provided by the United States District Court is the appropriate forum for comments on the settlement and issues relating to the proposed response actions within the Wallace Branch right of way.

An opportunity for public comment was also provided before Union Pacific made its filing with the STB in June of 1999. The documents to be filed were made available



to the public at various locations in the three affected counties in advance of filing. In short, every effort has been made to provide opportunities for the public to participate in, and influence, the Consent Decree and this abandonment proceeding.

#### Need to Avoid Delay

Under the terms of the Consent Decree, Union Pacific has been provided access to the Slag Pile Area (hereinafter "SPA") in Kellogg, Idaho for disposal of contaminated materials generated from the salvage operations and response actions to be undertaken on the right of way. Access to the SPA is limited to a period currently scheduled to end on October 1, 2001. The SPA has been designated by EPA and the State as an approved disposal site for this material. It is essential for the completion of the salvage and response actions that Union Pacific have access to this disposal area since there are, at present, no other such areas available for the volume of material that will be generated by this project.

Given the extent of the salvage work and the response actions required for the 72 mile line (less the right of way within the Bunker Hill Superfund Site) salvage of the line needs to begin in May of this year in order to be finished before the SPA closes. Because of this schedule, Union Pacific requests that the SEA not grant any extensions to the comment period and that the SEA complete the Supplemental Environmental Assessment promptly so that the Board can make its decision on the abandonment as soon as possible. Union Pacific respectfully submits that in light of the extensive opportunity for public comment that has been afforded, there is no reason for further comment or delay.

#### Clarification of Footnotes

Union Pacific requests that the SEA clarify footnotes 2 and 14 in the Draft Supp. EA to mirror the statement of the ICC on page 2 of its November 28, 1994 Decision, Docket No. AB-33 (Sub-No.70). The footnotes should provide that Section 121(e)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter "CERCLA"), 42 U.S.C. 9261(e)(1), relieved Union Pacific of the requirement to obtain permission from the Board to remove track within the Bunker Hill Superfund Site ("BHSS"), if it is done in connection with remediation actions carried out in compliance with CERCLA. Pursuant to Section 121(e) of CERCLA, Union Pacific has removed track within the BHSS in connection with remediation actions carried out in compliance with CERCLA. Union Pacific has not, by undertaking such remediation, or by any other action, abandoned any portion of the Wallace Branch, including the portion within the Superfund Site.

#### Modification of Historic Preservation Condition

The Draft Supp. EA proposes as a condition that until the Board rules on any pending requests for a Certificate of Interim Trail Use (hereinafter "CITU") under the Trails Act, 16 U.S.C. 1247(d), Union Pacific shall retain its interest in and take no steps to alter the historic integrity of all structures, including the rail line itself, that are

50 years old or older to allow completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (hereinafter "NHPA").

Union Pacific agrees not to take any actions adversely affecting the line or structures thereon until the Board issues the CITU. The Governments understand this condition and it is reflected in the Consent Decree. As the Board is aware, the State and Tribe have filed for public use of the line under the Trails Act. Future obligations for maintenance and operation of the trail and trail surface will require that the State and Tribe be issued the CITU. As noted above, the Consent Decree requires that Union Pacific undertake certain response actions including construction of an asphalt cap over part of the right of way. This cap will serve to contain areas of elevated levels of metals and also provide the surface for the recreational trail. The Idaho State Historic Preservation Officer (hereinafter "SHPO") has taken the position that abandonment without conversion to a recreational trail would constitute an adverse effect on the National Register eligible property. Union Pacific is committed to the construction of the recreational trail under the terms of the Consent Decree as soon as final abandonment is authorized, the CITU is issued and salvage of the line can begin.

One of the structures on the line that is more than 50 years old is the Chatcolet swing span bridge that crosses the southern end of Lake Coeur d'Alene. The Consent Decree provides that the Tribe may determine if it wishes to operate the Chatcolet swing span bridge or have Union Pacific replace it with a fixed span structure. This reflects the Tribe's concern about the feasibility and cost of operating this 80-year old structure. Because of the age of the swing span bridge, Union Pacific and the Tribe have begun discussions with the Idaho SHPO to address this issue. Given the schedule that Union Pacific must follow to complete the response actions under the Consent Decree, it is important that resolution of any NHPA issues relating to the Chatcolet swing span bridge not delay commencement of the salvage of the remainder of the line once abandonment is authorized and the CITU issued. In the event that the Chatcolet swing span bridge could be adversely affected by abandonment or salvage, Union Pacific intends to enter into a mitigation agreement with the SHPO, as appropriate, in accordance with section 106 of NHPA.

Union Pacific therefore understands that, once abandonment is authorized and the CITU issued, then Condition 6 relating to the NHPA is satisfied for all features of the rail line including rails, ties, other track material, culverts, bridges and other structures with the potential exception of the Chatcolet swing span bridge. Once abandonment is authorized and the CITU is issued, then Union Pacific may commence salvage of the rail, ties, other track materials, tailings, ballast, and concentrates and related materials, and may commence work on bridges and culverts to prepare them for use as part of the recreational trail. Because of the unique circumstances of the Chatcolet swing span bridge under the Consent Decree, Union Pacific requests clarification of Condition 6 to provide that if the historical integrity of the Chatcolet swing span bridge could be adversely affected by abandonment or salvage, then Union Pacific would not take any actions with respect to the Chatcolet swing span bridge until an appropriate mitigation

February 18, 2000

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agreement is reached with the Idaho SHPO. This approach, consistent with the NHPA, will permit Union Pacific to meet its obligations under the Consent Decree.

Respectfully submitted

for Tom E. Greenland

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Attention: Phillis Johnson-Ball

RE: Draft Supplemental Environmental Assessment STB Docket #AB-33  
(Sub-No.70)

Union Pacific Railroad Company  
Abandonment Wallace Branch, Idaho

Dear Vernon A. Williams,

In response to the Supplemental Environmental Assessment and related sections addressing the treatment of significant historic resources, we register strong concerns regarding the following:

The Idaho State Historic Preservation Office (SHPO), in a letter dated February 18, 1999, stated that, conversion of the rail line to a recreational trail will have no adverse effect provided that the historic bridges and features associated with the line are not removed or altered. Because we have recently been informed that the swing bridge, evaluated as significant and eligible for the National Register, will be removed in the trail conversion, we request that a reconsideration of effects on historic properties be made.

Removal of the bridge constitutes an adverse effect under Section 106 of the National Historic Preservation Act. A finding of adverse effect requires consideration of alternatives, and/or a mitigation process involving formal documentation. In addition, because of the adverse effect finding, responsible parties must consult with the Idaho State Historic Preservation Office and develop a Memorandum of Agreement (MOA). The MOA must then be submitted to the federal Advisory Council on Historic Preservation.

In addition, we have serious concerns that federal funds (T-21 grants) have been made available for the trail project, but are not being applied

toward the preservation of the historic swing bridge. Under Federal Transportation Authority guidelines that govern the use of T-21 monies, historic bridges are entirely eligible for rehabilitation using such grants. We question the selective use of T-21 monies, in this instance, for trail preparation but not for the preservation of Idaho's last historic swing bridge. Furthermore, the use of T-21 monies constitutes a federal undertaking which further subjects the trail project to historic preservation compliance under Section 106, which prohibits the use of federal funds for the unmitigated destruction of significant historic properties such as the swing bridge.

Furthermore, the proposed removal of the swing bridge and possible construction of a replacement pedestrian bridge raises serious environmental concerns that have not been addressed in any of the previous documents or in the draft SEA. Such removal will pose considerable environmental damage related to contamination, disturbance of toxic deposits on the lake bottom, and habitat degradation for wildlife that live around the bridge. In addition, construction of a new bridge would exacerbate all of the above.

We therefore object to the lack of supplemental environmental considerations and planning for the proposed bridge removal, and for the lack of compliance with Section 106 regarding the mitigation and documentation of the swing bridge. In addition, because the construction of a new bridge could adversely impact the visual and associative integrity of the former rail line, we request that the Idaho SHPO be consulted for Section 106 compliance regarding the appropriateness of design for any proposed replacement bridge. Many residents of, as well as visitors to the area, want to see this swing bridge preserved since it has been such an integral part of the use and personality of the south end of Lake Coeur d' Alene for over 100 years. This bridge defines the area where the waters of the lake meet the waters of Round Lake, Lake Chatcolet, and the mouth of the Saint Joe River, where the railroad crossed them and the bridge opened to allow water traffic to navigate their way as well. It has been a fascinating landmark and should be preserved.

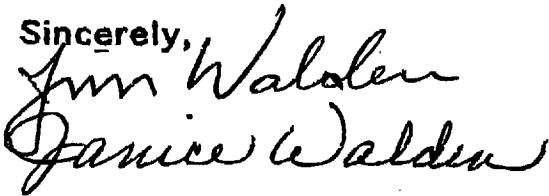
In addition, on page 1-6, Section 1.3, Project Overview, it is further stated that, crossing structures including the swing bridge crossing of Coeur d' Alene Lake are also being preserved and modified in support of the conversion of the ROW to the recreational trail. Because no specifics are

provided regarding modification it can only be concluded that such modifications could potentially compromise the integrity of the swing bridge as well as the other significant bridges that were identified in the original EE-CA. Again, pursuant to Section 106, we request that UPRR enter into consultation with the Idaho SHPO regarding historic and architectural impacts to eligible bridges during modification, and further request that appropriate Memoranda of Agreement be made for such modifications. There should be public involvement and a period for public comment before any changes to the plan that has been published for public comment are arbitrarily implemented.

Because of the above issues, we strongly disagree with the statement in the draft SEA (pg. 36), if a CITU permitting trail use pursuant to the Trails Act is issued, the Section 106 process would be complete, and Environmental Condition No. 6 would be satisfied without further action by the Board.

In conclusion, we assert that the above issues demonstrate that UPRR has by no means satisfied compliance with Section 106 of the National Historic Preservation Act regarding the treatment of significant historic properties.

Sincerely,

Handwritten signatures of Jim Walden and Janice Walden in cursive script.

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Janice Walden  
J-Dub, Inc.  
31425 S. Benewah Road  
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**UNITED STATES  
SURFACE TRANSPORTATION BOARD**

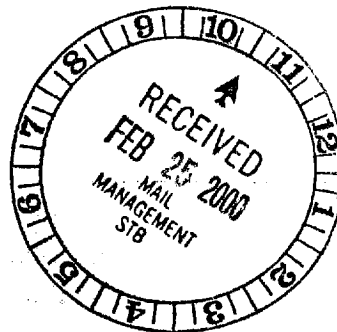
**IN THE MATTER OF:**

**UNION PACIFIC RAILROAD COMPANY  
ABANDONMENT WALLACE BRANCH, ID**

**STB Docket No. AB-33  
(Sub-No. 70)**

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**COMMENTS ON DRAFT SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT**

Members of Citizens Against Rails-to-Trails ("CART") are Idaho landowners who own land adjoining the former Union Pacific Railroad Company's ("Union Pacific") railroad right-of-way which is the subject of the instant proceeding. Some or all of the Commentators also own fee simple title to the land over which the right-of-way runs by reason of the grant of easement rights to the railroad company upon the railroad company's initial acquisition of the right to construct and operate the railroad line. Upon the termination of the use of such right-of-way for railroad purposes, the purpose for which the original easement grants were made, the easement is extinguished. Thus, environmental issues addressed in the Supplemental Environmental Assessment ("SEA") directly affect CART members either because contamination conditions are adjacent to members' land or is in fact on members' land.

For the reasons stated below, Commentators believe the SEA is inadequate to satisfy the STB's obligations under the law, does not meet the requirements imposed on the STB by the Court in *Idaho v. ICC*, 35 F.3d 585 (D.C. Cir. 1994), and must be modified substantially before the *Idaho* criteria are satisfied. In addition, Commentators believe that a Certificate of Interim Trail Use ("CITU") cannot be issued in this proceeding because (1) the SEA does not meet requirements for environmental analysis of the disposition of the trail under the National Trails System Act and (2) the right-of-way corridor cannot qualify as a recreational trail by reason of the environmental hazards on and adjacent to the right-of-way corridor.

### BACKGROUND

The ICC issued the first Environmental Assessment ("EA") on September 27, 1991. As a result of litigation commenced by the Coeur d'Alene Tribe, the Court of Appeals for the D.C. Circuit reviewed the EA and established principles of environmental assessment required of the STB. *Idaho v. ICC*, 35 F.3d 585 (D.C. Cir. 1994). In response, on December 2, 1994, the ICC re-opened the proceeding to complete an environmental analysis of the potential impacts of salvage. In 1996 the United States Department of Justice, on behalf of multiple United States government agencies, filed suit with respect to environmental issues on the right-of-way corridor.

On August 3, 1999, the State of Idaho and the Coeur d'Alene Tribe requested a CITU and submitted a Statement of Willingness to Assume Financial Responsibility pursuant to 49 C.F.R. 1152.29. On June 18, 1999, Union Pacific submitted environmental information to the STB. The public was afforded an opportunity for comment. The STB issued the SEA as a result of the Union Pacific submissions and other public comments. The instant comments are made pursuant



to an invitation for public comment on the SEA. The STB's Section on Environmental Assessment "seeks public input on all aspects of this Draft Supplemental EA, as well as on the Board's environmental review process, so that [the Section] can assess public concerns and issues related to the Union Pacific proposal and determine whether additional environmental analysis and mitigation are necessary to analyze and effectively mitigate the potential environmental impacts that could occur as a result of track salvage activity on this line." SEA, p. ES-5.

After several years of negotiation, the parties in *United States v. Union Pacific RR Co.*, CV99-0606-N-EJL, United States District Court, District of Idaho, filed a proposed Consent Decree on December 23, 1999. Pursuant to 28 C.F.R. 50.7, a public comment period has been established. CART intends to submit comments on the proposed Consent Decree.

**THE STB IS REQUIRED IN ITS ENVIRONMENTAL ASSESSMENTS TO CONSIDER  
USES OF THE CORRIDOR OTHER THAN RAILROAD USE SO LONG AS THE STB  
RETAINS JURISDICTION OVER THE LINE**

The National Environmental Policy Act ("NEPA") requires federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment" a detailed statement that contains specified information, commonly referred to as an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). The Act also specifies that such recommendations or reports address enumerated topics and provide information sufficient to satisfy the basic requirements of the Act.

In the instant proceeding, Union Pacific applied for abandonment authority on August 22, 1991, seeking authority under former 49 U.S.C. § 10903 for the 71.5 mile Wallace Branch. Union Pacific submitted an environmental report and the ICC received objections. Many of the

environmental concerns related to the contamination of the right-of-way by heavy metals caused by railroad operations, mine wastes used as ballast for the Union Pacific rail line, and spills of concentrate materials. SEA, p. 2. The ICC's Section of Environmental Analysis issued an Environmental Assessment ("EA") on September 27, 1991. By decision served November 2, 1992, the ICC granted Union Pacific's abandonment application subject to six enumerated conditions. The adequacy of the ICC's EA report was challenged by petition of the State of Idaho and three mining companies for review by the United States Court of Appeals for the District of Columbia Circuit. The court affirmed in part and remanded in part. *Idaho v. I.C.C.*, 35 F.3d 585 (D.C. Cir. 1994). The court held that the imposition of the six conditions, some of which were based on approval by other agencies, did not meet NEPA requirements imposed on the ICC.

#### **The United States Court of Appeals Has Established Requirements for STB Environmental Assessments**

The court in *Idaho* affirmed the applicability of NEPA requirements to the STB, specifically to the abandonment process which is the subject of the instant proceeding. NEPA establishes requirements that any recommendation or report (a "detailed statement by the responsible official" is required) must meet. 42 U.S.C. § 4332(2)(C). NEPA requires that an EIS include, *inter alia*:

1. The environmental impact of the proposed action (42 U.S.C. § 4332(2)(C)(i));
2. Any adverse environmental effects which cannot be avoided should the proposal be implemented (42 U.S.C. § 4332(2)(C)(ii));
3. Alternatives to the proposed action (42 U.S.C. § 4332(2)(C)(iii)); and

4. Any irreversible commitments of resources which would be involved in the proposed action should it be implemented (42 U.S.C. § 4332(2)(C)(v)).<sup>1</sup>

In the instant proceeding, the ICC declined to prepare a complete and independent EA on the abandonment and did not include the analyses required by NEPA, relying on Union Pacific's submission. Instead, the ICC conditioned salvage operations associated with the abandonment on six protective conditions which, if satisfied, would establish the condition that "this abandonment proposal will not significantly affect the quality of the human environment."

*Union Pacific R.R. Co. – Abandonment – Wallace Branch, ID*, 9 I.C.C. 2d 325, 339 (1992).

Among the protective conditions, the ICC required that Union Pacific consult with various federal and state agencies about the specific environmental impacts that fell within those agencies' jurisdiction. The court in *Idaho* held that the ICC itself was obligated to meet all NEPA requirements, and the ICC improperly deferred to the scrutiny of other agencies. "An agency cannot delegate its NEPA responsibilities in this manner. . . ." citing *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971)

The court, citing *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982), imposed four criteria on the ICC:

1. Whether the agency took a "hard look" at the problem;
2. Whether the agency identified the relevant areas of environmental concern;
3. As to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant; and

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<sup>1</sup> The detailed statement must also include "the relationships between local short-term uses of man's environment," not discussed in CART's response to the SEA.

4. If there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum.

The court held that the ICC itself did not take a "hard look" at the problem, but rather deferred to Union Pacific's independent consultation with other agencies.<sup>2</sup> The STB must establish its own standards for actions taken within its jurisdiction. "Certification by another agency that its own environmental standards are satisfied involve an entirely different kind of judgment. Such agencies, without overall responsibility for the particular Federal action in question, attend only to one aspect of the problem." *Calvert Cliffs*, 449 F.2d at 1123. The court in *Idaho* also found that the ICC deferred not only to the judgments of other agencies, but also to that of Union Pacific, the licensee. *Idaho*, 35 F.3d at 596.

The court established several principles of critical importance in the instant proceeding (and other similar proceedings as well).

1. It is clear that all STB actions taken within its jurisdiction are the subject of the STB's environmental assessment obligations under NEPA should the actions have an impact on the human environment.
2. Assignment of NEPA-imposed responsibility may not be delegated to either other agencies or private parties. The STB must satisfy each of the four criteria listed by the court, and failure to satisfy any one condition renders the STB's an invalid response under NEPA and the court-imposed *Idaho* criteria.

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<sup>2</sup> Because the ICC failed to meet the first criteria, the court did not address the remaining three. However, all four criteria apply to the STB.

3. All major actions by the STB that significantly affect the quality of the human environment require STB investigation and analysis sufficient to meet the enumerated NEPA requirements (42 U.S.C. § 4332(2)(C)) and the court-imposed *Idaho* criteria.
4. Among other requirements, the STB must engage in a “case-by-case balancing judgment.” *Calvert Cliffs*, 449 F.2d at 1123. “In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values. . . . The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken.” *Id.*
5. The STB is required to consider and determine the impact of actions within its jurisdiction on the “quality of the human environment.”<sup>3</sup> 42 U.S.C. 4332(2)(C).

**STB Environmental Assessment Requirements Include STB Certificates of Interim Trail Use of Railroad Right-of-Way Corridors Pursuant to the National Trails System Act**

Until 1983, typically the final federal action within the jurisdiction of the ICC was the grant of permission to abandon a railroad line and engage in salvage operations. The ICC’s responsibilities under NEPA terminated with the salvage, line abandonment, and removal of the

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<sup>3</sup> The emphasis on “human environment” is critical. As noted below, the conversion of a former railroad right-of-way to a recreational trail impacts the “human environment” as no isolated segment of an active railroad line would. Not only is human contact with the corridor a new use of the corridor, but the literal invitation of individuals to use a corridor that was not even accessible before the trail multiplies immensely any environmental hazard on the corridor.

line from the national transportation system with the resultant loss of the ICC's jurisdiction over the line.

This situation changed dramatically with the enactment of the rails-to-trails provision of the National Trails System Act in 1983. 16 U.S.C. § 1247(d). Pursuant to that Act, when a railroad company wishes to abandon a line, the railroad company may discontinue the line and engage in salvage operations, but the right-of-way corridor is converted to interim trail use and the line is not abandoned for federal jurisdiction purposes. Rather, the line is "railbanked" and preserved for future possible reactivation as an active rail line. Contrary to the normal abandonment procedure, the STB does not lose jurisdiction over the line upon conversion to interim trail use. In addition, interim trail use is conditioned on the STB issuance of a certificate of interim trail use or a notice of interim trail use. With the STB's action, a new and completely different use of the right-of-way occurs pursuant to the National Trails System Act.<sup>4</sup>

As clearly demonstrated in this proceeding, the conversion of a railroad right-of-way corridor from railroad use to recreational trail use may have major human environmental implications. In many cases, again demonstrated by the instant proceeding, the salvage operation itself, which is the subject of STB's environmental analyses, may differ dramatically depending on whether the right-of-way corridor is to be abandoned for railroad purposes or will be

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<sup>4</sup> Although Commentators emphasize the conversion from railroad use to recreational trail use, the National Trails System Act requires that the corridor be preserved such that the rail line can at some future date be reactivated. The railbanking provision of the Act may require environmental analysis in addition to that required to address recreational trail use of the corridor.

preserved for recreational trail purposes. Examples of the differences include: Requirements for physical modifications for trail use; the fact that the corridor will be used by the public for recreational purposes rather than returned to fee owners upon abandonment; the new use of the land by recreationalists who will be exposed to contaminants not otherwise in close proximity to human contact, and any environmental consequences of the requirement that the corridor be maintained for possible future rail line reactivation.

NEPA requires not only an analysis of the environmental impact of the proposed action (42 U.S.C. § 4332(2)(C)(i)), it also requires analysis of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). The *Idaho* court repeatedly emphasized that the agency must engage in a case-by-case balancing judgment, alternatives must be considered which would affect the balance of values. Interim trail use is an alternative to line abandonment. The STB must conduct a “hard look” analysis that will enable the agency to meet NEPA’s mandate.

The railroad use of the right-of-way corridor and line abandonment is an activity that triggers NEPA requirements for EIS documentation. However, institution of an interim trail use maintains STB jurisdiction. The conversion may have significant impacts on the human environment, again as demonstrated in this proceeding in which the parties to a separate lawsuit contemplate conversion of the contaminated right-of-way corridor into a recreational trail.

The STB cannot avoid its NEPA mandate for environmental analysis pursuant to the requirements of 42 U.S.C. § 4332(2)(C) and the standards laid out in *Idaho* by asserting that the issuance of a CITU or a NITU is a mere ministerial function and thus not an “action” for

purposes of NEPA.<sup>5</sup> The National Trails System Act imposes standards and requirements for interim trail use, and it is within the STB's sole jurisdiction to enforce the Act. In addition to requirements imposed on trail sponsors including liability for the trail, the Act requires that the interim use of the right-of-way corridor be for a recreational trail. The National Trails System Act notes that trails are established to promote "the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historical resources of the Nation." 16 U.S.C. § 1241. It would be perverse, indeed, if the STB were not required to identify and assess the imposition of a recreational trail on a right-of-way corridor contaminated by products known to be hazardous to human health, and even inviting human contact with contaminants for which little exposure previously existed. The instant proceeding demonstrates the fallacy of such a position.<sup>6</sup>

**THE STB IS REQUIRED TO INCLUDE TRAIL USE OF THE CORRIDOR IN AN ENVIRONMENTAL ANALYSIS OF ABANDONMENT AND SALVAGE AT ISSUE IN THIS PROCEEDING**

The STB has not issued a CITU in this proceeding and does not intend to consider such issuance until some time in the future. SEA, p.11 . The State of Idaho and the Coeur d'Alene

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<sup>5</sup> The STB asserts that the STB's jurisdiction in matters of the National Trails System Act is ministerial only and that the "it does not exercise sufficient federal control to render Rails-to-Trails conversions 'major Federal actions' under NEPA." SEA, p. 8.

<sup>6</sup> Even if the conversion did not in and of itself require NEPA action, in the instant case the inseparability of the salvage process, which the STB recognizes requires environmental analysis, from the subsequent use of the contaminated land for recreational purposes pursuant to STB's CITU mandates that NEPA requirements be met for the conversion to a recreational trail pursuant to the National Trails System Act which is in the sole jurisdiction of the STB for purposes of this proceeding.



Tribe have filed Statements of Willingness under 49 C.F.R. 1152.29 and Union Pacific has indicated it is willing to negotiate with the trail sponsors. The STB has stated the it intends to consider all trail use requests at the time of issuance of its final decision in this matter. SEA, p. 11, n.18.

The environmental analysis of abandonment and salvage operations addressed in the SEA cannot be separated from the environmental implications of conversion of the contaminated railroad right-of-way corridor to a recreational trail pursuant to the National Trails System Act. Neither can the STB's obligation to prepare an EA meeting the *Idaho* criteria be conducted in such isolation as to ignore one of the most significant actions – the issuance of a CITU – that will directly expose the public to contamination on the corridor which is and will remain within the STB's jurisdiction. The major determinant of the future use of the right-of-way corridor is the outcome of *United States v. Union Pacific RR Co.*, CV99-0606-N-EJL, United States District Court, District of Idaho. The settlement of that case as determined by the proposed Consent Decree of December 23, 1999, is conditioned on the issuance of a CITU by the STB. Consent Decree, p. 19.

Salvage activities and the environmental conditions of the corridor and adjoining land will depend substantially upon subsequent use to be made of the corridor. If railroad line abandonment occurred and no future use of the corridor were contemplated, there would be no reason to conduct salvage activities in such a manner as to accommodate maintenance of the physical corridor. Neither would it be necessary to take actions that anticipate the heavy use of the corridor by recreational visitors who will come in contact with contamination on the corridor or adjacent to the corridor.

Implications of salvage operations and the resultant environmental conditions will also depend on the future ownership and possession of the corridor. If a CITU is not issued, fee owners will take possession of their land and the corridor will no longer be a continuous strip of land under the management and control of a single entity. Rather, the individual owners will realize the consequences of salvage activities. If conducted properly to restore the land to a useable and nonhazardous state, the land can be used accordingly. If, on the other hand, contamination remains on the land, landowners will suffer the results. In any case, the impact on human environment will depend entirely on whether the corridor is maintained as a recreational trail or comes under the complete control of private owners.

As a legal matter under the National Trails System Act, as a procedural matter under the STB's regulations and procedures under its regulatory and CITU-issuing authority, and as an environmental sciences matter, abandonment, salvage, and interim trail are inseparable. The *Idaho* court held that an EA cannot meet NEPA requirements if it is so piecemeal that it fails to encompass all the issues within the ICC's jurisdiction. The court rejected the ICC's argument that the ICC should be able to conduct partial environmental analysis for a continuing process, then conduct further environmental analysis when a succeeding event in the process may occur. The court held that "[p]iecemeal enforcement of license conditions is no substitute for an overarching examination of environmental problems at the time the licensing decision is made." 35 F.3d at 596. The integral process of abandonment application, salvage, and interim trail use in this proceeding require just such an "overarching examination" of environmental problems.

Despite the clear NEPA implications for possible right-of-way corridor use for recreational trail purposes, the SEA specifically avoids a review of any aspect of either the nature

of the conversion during salvage actions or the condition of the corridor for trail use. "Nor is the possibility that the Wallace Branch may be used as a trail under 16 U.S.C. § 1274(d) part of the Board's environmental review process." SEA, p. 17. This is a fatal flaw in the SEA as now prepared.

### **THE SEA FAILS TO MEET REQUIREMENTS FOR NEPA ANALYSIS WHERE INTERIM TRAIL USE IS PROPOSED FOR THE RIGHT-OF-WAY CORRIDOR**

The SEA and the documents upon which it is based fail to meet NEPA requirements for analysis and fail to meet the criteria established in *Idaho* where interim trail use is proposed for the right-of-way corridor.<sup>7</sup> An analysis of the *Idaho* criteria and NEPA requirements show that the *Idaho* court's mandate to the ICC have not been satisfied by the subsequent SEA.

### **The SEA Does Not Qualify as a "Hard Look" At the Human Environmental Issues**

While the SEA revisits the environmental issues, it falls far short of the "hard look" required by *Idaho* for several reasons. The SEA relies nearly entirely upon the EPA's submission of an Engineering Evaluation/Cost Analysis ("EE/CA") for critical information about the contamination issue and the consequences to human environment. Commentators do not disagree that the STB may use studies and analyses prepared by other entities. However, the analysis and data contained in those studies must address the problems that the STB must address. They must provide data that the STB would be required to provide itself if it were to

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<sup>7</sup> In most regards, the SEA and supporting documents also fail to satisfy the noted requirements even absent a proposed interim trail use. Such distinctions will not be itemized in these comments.

address the problems itself. The STB cannot simply delegate the decision-making process to another agency or entity. The EE/CA neither contained necessary information on environmental issues, nor did it consider the range of alternatives which the STB is obligated to consider. The SEA gives no indication that the STB's Section on Environmental Assessments conducted any meaningful analysis on its own independent of or even complementary to the EE/CA.

A serious shortcoming of the EE/CA as a supporting document for the SEA is evident by the complete difference in the objectives of the EE/CA and the SEA. The SEA did not consider "the possibility that the Wallace Branch may be used as a trail under 16 U.S.C. § 1247(d)" and was "not part of the Board's environmental review process." SEA, p. 17. To the exact contrary, the conversion of the right-of-way to recreational trail use was part and parcel of the EE/CA. The salvage methods and remediation of environmental problems caused by contamination are conditioned on the possible use of the corridor for a trail, an action that would require a CITU issuance from the STB.

The issuance of the CITU is an action to be taken by the STB and not part of the CERCLA decision process addressed by this EE/CA. However, since this EE/CA has been prepared to determine what response actions are needed to address human health and environmental concerns along the ROW, the potential issuance of a CITU for the ROW affects the control of and consequently the types of exposures to contamination that residents of the Coeur d'Alene Basin and others coming onto the ROW may experience in the future. The human health risks assessment incorporated into this EE/CA has taken such potential impacts on human health into consideration. Furthermore, while conversion of the ROW to recreational purposes under a CITU is not in and of itself a CERCLA response action, the EE/CA has also taken the conversion of the ROW into a recreational trail into account in evaluating and selecting appropriate response actions. Additionally ... if a CITU transfer of the ROW for recreational or conservation purposes were not implemented, the ROW may revert to persons or entities holding the reversionary property interest. The effects of such a reversion of the ROW on the implementability and effectiveness of response actions under consideration are also discussed, as relevant, in this EE/CA.

EE/CA, p. 2

The ROW is a narrow, continuous strip of land within the much larger Coeur d'Alene Basin. Therefore, the risk assessment considers only those behaviors and activities that may result in exposure to soils and dusts on the ROW properties, and focuses on an assessment of the incremental risks that may result from usage of the ROW by residents and visitors to the area. The quantitative analysis in the assessment are limited to the response action and evaluation of the reduction in exposures and of risk *associated with subsequent use of the ROW*. The assessment does not address other contaminants of concern, other exposure routes, nor exposures that may occur through activities beyond the ROW (i.e., camping, fishing, swimming, etc.) that individuals using the ROW might experience

EE/CA, p. 23 (emphasis added.)

The EPA also considered the conversion of the corridor into recreational trail use. Noting three subsets of exposure parameters applied in the risk management consideration, the EPA's Action Memorandum states "The second subset was the Modified Trail scenario which increased exposure frequency, contaminant bioavailability, and dose-response rates for lead, which reflect greater contact times associated with a developed recreational facility and the range of absorption parameters that could apply."<sup>8</sup> EPA Action Memorandum, p. 5.

UP has asserted and agreed that Union Pacific's only way out of the massive environmental contamination liabilities it faces under federal and Idaho law is to agree to conversion of the right-of-way for interim trail use. *See, generally*, proposed Consent Decree. The agencies with liability claims against Union Pacific, some of whom the *Idaho* court held the

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<sup>8</sup> The EPA and Union Pacific are parties to the proposed Consent Decree requiring that a CITU be issued to resolve environmental issues on the right-of-way. Commentators find it difficult to understand why the STB refuses to consider trail use implementation in its analysis when every other party involved in the proceeding makes trail use an absolutely essential feature of the environmental issues and any solution to existing environmental state and federal litigation.

STB could not depend on for the STB's NEPA obligations, also agree that the only acceptable outcome of the litigation is conversion of the contaminated corridor into recreational trail use. Thus, the sole interest of Union Pacific and the EPA, upon whose documents the SEA relies for data and analysis, is to conduct an environmental analysis based on the very corridor use for which the STB denies any NEPA responsibility in the SEA.

The STB's reliance on the EE/CA and other agencies' environmental assessments still falls with the *Idaho* court's description of a "blatant departure" from NEPA where the court said "the Commission has deferred not only to the judgments of other agencies, but also to that of Union Pacific, the licensee." 35 F. 3d 585 "We have held that the NEPA prohibits such an abdication of regulatory responsibility in favor of the regulated party." *Id.* The STB has made no substantial change in its delegation from that rejected in *Idaho*.

The deficiencies in the SEA are clarified by applying the NEPA requirements for an EA. The "environmental impact of the proposed action" (42 U.S.C. § 4432(2)(C)(i)) does not receive a "hard look" by the STB, not only because the SEA delegates all essential elements of the SEA to other entities engaged in a settlement process Union Pacific which is dependent on a CITU, but because the STB has not properly defined the "proposed action." By deferring any consideration of recreational trail implementation to another day, and treating only a particular example of salvage operations as the "action" considered, the STB is acting in a manner directly contrary to the mandate of the *Idaho* court that "[p]iecemeal enforcement . . . is no substitute for an overarching examination of environmental problems at the time the . . . decision is made." 35 F.3d 596.

For analogous reasons, the SEA fails to provide the hard look at “any adverse environmental effects which cannot be avoided should the proposal be implemented.” 42 U.S.C. § 4332(2)(C)(ii). Until the true results of the process are known and realistically assessed, adverse environmental effects simply cannot be identified.

NEPA explicitly requires an agency’s EA to address “[a]lternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). This the STB’s SEA utterly fails to do. With regard to salvage operations alone, a wide range of options may be open, each with its own environmental impact. One major course of conduct would be salvage operations that are designed to preserve the right-of-way corridor as continuous strip of land in a physical condition that permits recreational use. The other option is to recognize full abandonment and reversion of private interests to landowners. The second option would not require salvage operations that preserve the corridor. In addition, in some circumstances abandonment and reversion may not pose the level or type of environmental hazards as corridor preservation. By relying on the EE/CA and association documents, all of which assume trail use, the STB has failed to take the “hard look” at alternative actions required by NEPA and the *Idaho* criteria.

**The STB Did Not “Identify the Relevant Areas of Environmental Concern” as Required by the *Idaho* Criteria**

The SEA states that its sole purpose is to complete the environmental review process “by assessing (1) whether the six environmental conditions previously imposed by the ICC are met, (2) the environmental impacts of going forward with salvage activities at this time, and (3) how best to mitigate the potential impacts of track salvage.” SEA, p. 17. The SEA failed to identify the relevant areas of environmental concern as required in the *Idaho* criteria in two regards.

The “relevant area of environmental concern” is the *impact on the human environment* of the corridor use consequent to railroad line abandonment and what happens to the contaminated railroad right-of-way. While the SEA proposes that only salvage activities are considered for purposes of the SEA and that satisfying the six environmental conditions is the sole reason to complete the environmental review process, this view is much too restricted. As previously noted, the physical existence of the contaminated right-of-way corridor demands a comprehensive and overarching assessment of what can be done to alleviate the impacts of abandonment. In this case, however, the lurking dependence of the whole abandonment process subject to STB jurisdiction on the corridor’s subsequent trail use is simply ignored. Complete isolation of salvage activities from the realistic course of events in which a multitude of other human environmental issues are paramount fails completely to address the “relevant area of environmental concern.”

Reliance on only a single suggested method of salvage and corridor treatment for environmental reasons fails to encompass the relevant area of environmental concern. By relying on the EE/CA for all substantive data on environmental issues, the STB failed to identify the relevant areas of environmental concern.

#### **The SEA Did Not Make a “Convincing Case that the Impact is Insignificant”**

The third *Idaho* criteria allows the agency to make a convincing case that the impact on human environment is insignificant. The impact of salvage and other physical actions on the contaminated right-of-way associated with either abandonment or with conversion to recreational trail use are very significant, indeed. The right-of-way corridor is contaminated with materials



known to be harmful to humans. Lead is the most important contaminant because of its concentration. In addition, zinc, cadmium, and arsenic are present in excessive amounts. EE/CA, p. 23. Blood lead levels, in the absence of response actions, are predicted for the entire length of the right-of-way. EE/CA, p. 24. Contamination is recognized as a serious impact on any actions taken with regard to the right-of-way. Further, the contamination is precisely that of the most detriment to the human environment, including lead, zinc, cadmium, and arsenic. All of these facts combined with the plan to convert the contaminated corridor into a recreational trail for public use demonstrate the significance of any decision affecting the corridor's use.

**The STB has Not "Convincingly Established that Changes . . . Sufficiently Reduce" the Environmental Impact "to a Minimum."**

The STB's SEA does not establish that the environmental problems are reduced to a minimum and certainly does not make the case "convincingly" as required by the *Idaho* criteria. The STB's SEA fails to establish the "reduction to a minimum" because it neither adequately identifies the area of environmental concern nor does it assess alternatives, a prerequisite for comparisons to reach a "minimum." The failure to make the case convincingly results from the STB's failure to meet minimal NEPA requirements. The SEA, based as it is on the EE/CA which focuses on a proposed settlement agreement in a litigated case, does not adequately address the impact of the proposed action as required in 42 U.S.C. § 4332(2)(C)(i). Nor does the SEA address the alternatives to the action as required by 42 U.S.C. § 4332(2)(C)(iii). In short, the SEA and the EE/CA upon which it is based are so deficient in analysis and alternatives that it is impossible to know if the impacts on the human environment have been reduced to a minimum.

The *Idaho* criteria requires case-by-case balancing for this very reason. "In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values . . . . The point of the individualized balancing analysis is to ensure that, with possible alterations, the optimally beneficial action is finally taken." *Idaho*, quoting *Calvert Cliffs*, 449 F.2d at 1123. With the information provided in the EE/CA upon which the SEA relies, individualized balancing fails and it is not possible to make an informed judgment about an "optimally beneficial action."

### CONCLUSIONS

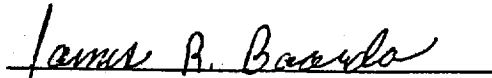
For the foregoing reasons, the STB's SEA does not satisfy the requirements established in *Idaho v. ICC*, 35 F.3d 585 (D.C. Cir. 1994). The STB was required to at least consider the most likely options in the abandonment and salvage process to which the SEA was directed. The requirement in the proposed Consent Decree between the United States, the State of Idaho, and Union Pacific, with an associated proposed Consent Decree in a companion case, demonstrates that the STB itself must independently meet NEPA requirements, applying the *Idaho* criteria, to assess the impact of conversion of the contaminated right-of-way corridor to a recreational trail.

Further, NEPA requires that the STB consider fully the contemplated conversion of the right-of-way to recreational trail use pursuant to the National Trails System Act and the impact of such conversion on the human environment. All requirements of NEPA detailed at 42 U.S.C. § 4332(2)(C) apply, as do the criteria established in *Idaho*.

Commentators request that the STB withdraw the current SEA and conduct an independent analysis meeting all NEPA requirements, and that the analysis specifically focus on the human environmental impacts of converting this contaminated right-of-way into a recreational trail.

February 22, 2000

Respectfully submitted,



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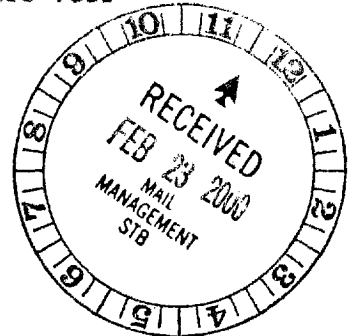
2833 E. O'Gara Road  
Harrison, Idaho 83833-7621  
February 17, 2000

Vernon A. Williams  
ATTN: Phillis Johnson-Ball  
Surface Transportation Board  
Office of the Secretary, Room 711  
1925 K Street NW  
Washington, D.C. 20423-0001

ENTERED  
Office of the Secretary

FEB 24 2000

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Dear Ms. Johnson-Ball:

In accordance with Chapter 7, Section 7.3 "Comments," Draft Supplemental Environmental Assessment, Docket No. AB-33 (Sub No 70), Union Pacific Railroad Company Abandonment, Wallace Branch, Idaho, we submit the following comments in an original and two copies:

We will address this issue by first telling you that the Union Pacific Railroad (UPRR) Right-of-Way (ROW) travels through our property south of Harrison, Idaho, approximately one-half mile in length along the shores of Coeur d'Alene Lake. We own and pay taxes on property on either side of the ROW. Therefore, we have a legitimate, vested interest in the cleanup process and the future plans for this abandoned corridor.

We realize, as you should, that this rail corridor is very unique because of the decades of contamination from open ore cars as they travelled from the mines to the processing destination. It seems to us, you have two important, but basic decisions to make in this case, i.e., is the proposed cleanup adequate beyond any question and because of this pollution, is the rail corridor a legitimate candidate for railbanking in order to allow for the issuance of a CITV for conversion to a trail?

Pertaining to the premise of railbanking, we would offer the following for consideration. Before you approve this corridor for a rails-to-trails conversion under the railbanking law, you need to establish the prerequisites for an honest evaluation, i.e., a litmus test of sorts. We believe in order to meet the intent of the railbanking law, you must consider the one determining factor -- is this corridor truthfully a viable candidate for a future resumption of railroad service; e.g., is the cleanup process completely and unequivocally adequate whereby another railroad company could come in, lay ties and tracks and proceed on with rail service??? Or, would such a company face further cleanup requirements and the assumption of cleanup liability which in effect would deter any company from ever choosing to open up this can of worms? Consider that if this trail is approved, the portion of the trail from Harrison, Idaho, north will have the tracks and ties removed and will be "capped" with asphalt; signs will be posted along the trail advising users of the contamination dangers. The whole concept of this trail is based on "railbanking" to allow future use. Are you willing to accept responsibility that all

pollution will be adequately removed so that a future railroad company will have absolutely no concerns or liabilities for further contamination removal or cleanup????????? I think your answer would be "well that's not our problem" -- but it is since the determination to issue a CITU is yours and yours alone and there are laws upon which you must fairly and impartially make your decision. Will the EPA cleanup requirements be more stringent in 10 or 20 or 30 years from now? Will the costs of new requirements be so exorbitant as to deter another railroad from ever considering resuming rail service? If the answer is "yes" to any of our questions, then this corridor is not a legitimate candidate for railbanking, plain and simple! What railroad company in its right mind would ever consider coming in to a known polluted corridor, understanding that removing the asphalt cap to shore up the ballast and install ties and rails will open up a Pandora's box of unknown proportions of contamination? It is our belief that this scenario will never happen because of the buried pollution and the tremendous liability which would be incurred by the assuming railroad company. Because resumption of rail service in the future is not truly viable or realistic, then the whole concept of "railbanking" is but a pretentious slight-of-hand method to take away our land and put a trail in its place. We object to such an underhanded process of taking advantage of an unrealistic law (in this particular "contaminated" situation) to seize private citizens' property. If you approve this CITU for this trail, then the law is knowingly being used unfairly and that is an affront to our democratic system of government!

What safeguards/procedures have been established to contain the contaminated dust (lead concentrates) which will be disturbed, will become airborne and then will be deposited on everyone's adjacent property during the process of removing the contaminated ballast in preparation of the track area for the proposed trail? This is tantamount to a demolition process. It is our understanding that when a historic building containing lead or asbestos contamination is demolished, large massive plastic tents must be erected to contain airborne particulates. How will containment of these airborne lead particulates be addressed??? -- Or have such measures been conveniently overlooked???

Our February 8, 1999 "Response to Open House and Cleanup of the Right-Of-Way and its use as a Trail" letter addressed to Rick Cummins (Idaho Department of Parks and Recreation), Phil Cernera (Coeur d'Alene Tribe), and Earl Liverman (U.S. Environmental Protection Agency), with a copy to Governor Kempthorne (page 4, last paragraph), makes it a matter of record for our and other adjacent property owners' concerns relative to the dust which billoved out of the open boxcars and settled on our adjacent properties. Remember, these were open boxcars which rocked back and forth; not only did contaminated tailing residues drop through the boxcar floors onto the track corridor itself, but lead contaminated dust particulates became airborne and eventually saturated a swath of land when the dust settled. Thus, the adjacent areas next to either side of the track corridor were polluted for decades by this dust coating every time the loaded open ore cars travelled these rails! The draft SEA is concerned only with the ten foot width of the trail. What provisions have been made for the rest of the ROW (75' on either side of

the tracks) and our abutting lands? How do you propose to address that contamination? Only the center between the tracks has been tested in our area, the 7 miles south of Harrison to the swing bridge. More testing needs to be done before you determine that all pollution cleanup requirements have been met in our area. Please give the adjacent landowners details on how that area will be dealt with to everyone's satisfaction. That consideration is owed to the adjacent residents. If that pollution is ignored, then you are guilty of giving the Union Pacific Railroad a real sweet deal by allowing them to disregard any sort of attention to that very important cleanup process. We wish to go on record with these questions, especially in light of the recent CNN edition of "Earth Matters" where it was reported that the Supreme Court has upheld the right of citizens groups to sue in order to make sure anti-pollution laws are enforced. No one should be exempt from complying with the law, including the UPRR, and especially, the Surface Transportation Board with so much power should not be a party to assisting polluting corporations "beat the system."

When we attended the first public meeting on the Rails-To-Trails proposal for the 72-mile train corridor, April 10, 1996, in Harrison, Idaho, Leo Hennessy of the State Parks and Recreation Department was in charge of the presentation. He offered attendees fact sheets prepared by the "Rails-To-Trails Conservancy" of Washington, D.C. We would assume the Conservancy was putting out accurate, well-researched information. These handouts were on the subjects of: 1) Rail-Trail Opposition, "The 12 Most Frequently Asked Questions;" 2) Rail-Trails and Liability; and 3) Railbanking, "What, Where, When, Why and How?" We are enclosing a copy of the handout for the latter topic; please refer to several identified statements as follows:

Reference is made to their numbered paragraph "1." They blatantly make reference to "under the umbrella of railbanking." By using the "umbrella" terminology, one sees what a scam this whole railbanking procedure is -- or more appropriately, this legalized taking of citizens' private property without due compensation.

Reference is made to their numbered paragraph "3." It is our understanding there will be no sale of this corridor from the UPRR to the State because of the contamination/cleanup deal made in the Consent Decree; that UPRR is more than relieved to get rid of this corridor and be released from any further liability claims by the Consent Decree if it is approved. That in itself is the UPRR's value received which in effect exonerates them.

Reference is made to their numbered paragraph "4." Isn't it ironic that the "trail agency" (in this case, the State of Idaho Department of Parks & Recreation and the Coeur d'Alene Indian Tribe) is "entitled to fair market value for the corridor" in the event some railroad applies to the STB to restore rail service in the future? In other words, they can sell our land (the right-of-way which cost them nothing thanks to laws designed to benefit industry rather than private citizen rights) which they "took" from us without any compensation. What another sweet deal with the lovely private citizen coming out on the short end of the stick once again!

Reference is made to their numbered paragraph "2" which we quote in its entirety: "2. The tracks and ties on a railbanked line can be removed. However, bridges and trestles must remain in place, and no

permanent structures can be built on the right-of-way."

Related to the above quote is our concern for the "Swing Bridge" where the tracks are on dikes at the south end of the lake. The swing bridge goes over the St. Joe River as it enters Coeur d'Alene Lake and connects these two dikes. As we understand it, this bridge is only one of two remaining swing bridges in the U.S. and is a historical site. And your (Surface Transportation Board) draft Supplemental Environmental Assessment makes reference to "preserving" historical sites. However, it is our understanding that this historical bridge is slated to go, i.e., the Tribe is pushing for its removal based on a trumped up engineering report that concludes it is too expensive to maintain. In fact, we understand that historic preservation compliance (a requirement of the draft SEA item #6) has not been satisfied with the State Historic Preservation Office in Boise, Idaho. It is incumbent upon you to make sure the letter of the law has been followed. Keep in mind, if they tear down this swing bridge and replace it, historic preservation compliance/mitigation, and probably environmental mitigation caused by its removal, could be far more costly and damaging.

Attached is a copy of a letter we sent to the local EPA representative, Earl Liverman, on March 29, 1999. Our letter, the purpose for writing it and the request for clarification on the specific subject matter, is self-explanatory. If you want to learn or verify first-hand how we adjacent property owners have been treated throughout this entire process, just ask Mr. Liverman to show you his written response to our questions and concerns -- he cannot produce any document because he never responded. We believe the last paragraph on the second page appropriately sums it up: "...Your silence, in essence, supports the 'intimidation tactic' used at every opportunity by Phil Cernera and others. No wonder some of our neighbors are accusing you (EPA), the Tribe and the Parks & Recreation Department of a 'conspiracy' on this rail-to-trails proposal. Where are your ethics and moral obligations to the public? What is the absolute truth about this issue? Please come forward and explain the law as it applies to this matter. Let's get this confusion resolved immediately so we can move on."

A decision to go forward with the trail will change our lives forever. Not only will our local environment remain polluted through no fault of our own, but we will lose our privacy, our solitude and the peace and quiet we have enjoyed and cherished for years. We have much to lose as we are automatically placed in a compromising position of having to accept additional liabilities brought about by increased human intrusion -- something we did not ask for and something we do not want! We will live under the threat of lawsuits brought against us by trail users who may trespass onto our docks, dive in the water, crack their heads open and then sue because we did not have a sign indicating there was a dangerous rock under the water. And then what about the trail user who carelessly tosses his cigarette into the brush and it starts a forest fire and our hillside timber crop is burned to the ground. Who will reimburse us for this loss? We're not talking fiction here -- this is for real.

We believe more stringent requirements for the UPRR cleanup must be demanded of them to address the discrepancies described above. It is

within your powers to make that happen. We citizens, adjacent property owners, who are so crucially involved with this situation must rely on the STB to do the honorable thing, not the politically correct thing. If this corridor is not thoroughly cleaned up and the conversion of the corridor to a trail is allowed under the pretense of railbanking, then our Government has let us down and in effect, has given us the shaft.

Sincerely,

*Angelo B. Bissell*

*Joyce L. Bissell*

ANGELO B. BISSELL  
JOYCE L. BISSELL

Encls:  
Conservancy Fact Sheet  
Ltr to EPA, Mar 19, 1999



# RAILBANKING

## What, Where, Why, When and How?

In 1983, concerned by the rapid contraction of America's rail network, the U.S. Congress amended the National Trails System Act to create the railbanking program. Railbanking is a method by which lines proposed for abandonment can be preserved through interim conversion to trail use.

If the title to an about-to-be-abandoned rail corridor is in question and there is any interest in trail use, the line should be preserved through railbanking. On the reverse side of this fact sheet is a 'boilerplate' letter that can be used to file railbanking and public use condition requests with the Interstate Commerce Commission (ICC).

Some rail corridors contain reversions to adjacent landowners that become effective as soon as the abandonment is consummated. However, if the line is railbanked, the corridor is treated as if it had not been abandoned. As a result, the integrity of the corridor is maintained, and any reversions that could break it up into small pieces are prevented.

Railbanking can be requested by either a public agency or a qualified private organization. The railbanking request must be sent to the ICC in Washington, DC, and must at the very minimum include a "Statement of Willingness To Assume Financial Responsibility" (see reverse side). Since the abandoning railroad company must agree to negotiate a railbanking agreement, a copy of the request for railbanking must be served on the railroad at the same time it is sent to the ICC.

A Public Use Condition (PUC) request is a separate request that is complementary to a request for railbanking. If a PUC request is made to the ICC, the Commission will place a restriction on the abandonment that prevents the railroad company from selling off or otherwise disposing of any property or trail-related structures, such as bridges or culverts, for a period of 180 days after the abandonment. This public use condition gives the prospective trail manager some breathing room for preparing an offer to the railroad. (The public use condition is also a good back-up device should the railroad not agree to railbanking since the ICC will issue public use conditions regardless of whether the railroad agrees.)

There are several other important points regarding railbanking:

1. A railbanking request is not a contract and does not commit the interested party to acquire any property or to accept any liability. It invites negotiation with the railroad company under the umbrella of railbanking. A party filing a "Statement of Willingness To Assume Financial Responsibility" is not accepting any financial responsibility. It is merely expressing an interest in possibly doing so.
2. The tracks and ties on a railbanked line can be removed. However, bridges and trestles must remain in place, and no permanent structures can be built on the right-of-way.
3. Under railbanking, there will likely still be an actual sale of the property, and the railroad will likely still want compensation. Railbanking is not generally a method for obtaining a free trail.
4. A railbanked line is subject to possible future restoration of rail service. Any railroad can apply to the ICC to resume rail service on a railbanked corridor. However, if the ICC restores rail service, the trail agency is entitled to fair market value for the corridor. The terms and conditions of a transfer back to rail service would be determined by the ICC.
5. The attached letter can only be filed on a rail line that is still under the authority of the ICC. Generally, the ICC loses authority 30 days after the effective date of an abandonment.

A more thorough discussion of railbanking and other legal issues related to rails-to-trails conversions is available in *Secrets of Successful Rail-Trails: An Acquisition and Organizing Manual for Converting Rails into Trails*, which is available from RTC for \$19.95 (\$16.95 for RTC members) plus \$4.00 for shipping and handling.

For text of "boilerplate" letter, see other side.



2833 E. O'Gara Road  
Harrison, Idaho 83833  
March 29, 1999

Earl Liverman  
U.S. Environmental Protection Agency  
1910 Northwest Boulevard, Suite 208  
Coeur d'Alene, Idaho 83814

Dear Mr. Liverman:

Since early February 1999, Phil Cernera has been quoted in various newspaper articles concerning the proposed Plummer-Mullan Recreational Trail as saying, "...if the proposal falls through, the railroad may be responsible for assessing the environmental impact of the tracks and possible contamination. Even worse, Cernera said, each landowner near the tracks may be liable for containment costs...." and more recently, "...if property does revert to adjacent landowners, they would be LIABLE FOR potential accidents on the land as well as CLEANUP OF ANY CONTAMINATION. If the trail project goes through, those costs would be covered by Union Pacific Railroad under a tentative negotiated agreement with the state and the tribe." In other words, he is telling us that the UPRR will only be responsible for cleaning up IF it becomes a trail??? That the UPRR is no longer liable for their contamination if the ROW were to revert to the adjacent landowner??? Wow, what a sweet deal that is!!! And you, the EPA representative involved with this project, support these statements?

When Phil was asked about his latter quote above at a local meeting in Harrison on March 18, 1999, with adjacent ROW landowners, (i.e., "The paper quoted you as saying that if this track fails to go through, the rails-to-trails, and goes back to the adjacent landowner, the adjacent landowner will be responsible for the cleanup") his reply was: "No, I said that -- I proposed that as a question, not as a statement of fact." We tape recorded his answer quoted directly above as a back-up so there could be NO mistake.

That was Phil's contradictory response to what he is quoted as saying in various newspaper articles -- "adjacent landowners would be liable for clean up of contamination" vs. "I proposed that as a question, not as a statement of fact." What kind of a shell game are you officials playing with the adjacent ROW landowners???

Following my questioning of Phil, I immediately asked Howard Funke what his interpretation was and he replied: "Well, the people who create the pollution are liable and under the law, the owners of the property are also potentially liable .... Simply owning the property on which the pollution exists gives you some liability for clean up of it according to CERCLA statute. There are certain things that attach

liability for clean up and one of them is ownership of the property -- outright ownership whether you had anything to do with getting it there or not. The fact that you own land that has pollution on it makes you potentially liable for clean up...."

Phil's rhetoric has become fodder for others to repeat as the gospel truth for a scare tactic. Most recently, the wife of a bicycle shop owner in the Silver Valley (of course she would be an expert on this subject and would have no economic interest to gain if this trail goes through, right?) has written a letter to the editor of her area's newspaper declaring the adjacent landowners will be responsible for footing the clean up bill if the ROW does not become a trail. We're sure that is the response Phil hoped to elicit from supporters of the trail and part of the calculated agenda to frighten the adjacent ROW landowners to get them on board to support this proposed trail.

We spoke to you personally, Earl, at the February 10th Open House in Harrison; we told you an out-of-state EPA attorney had said that **"if you create the contamination, you own the contamination forever and ever unless someone else agrees to assume responsibility for your contamination."** You assured us that statement was absolutely correct.

Based on your concurrence with the statement in the previous paragraph and all the contradictory "scare" remarks made on this controversy of who is liable for clean up, our purpose in writing you is to ask why you are quietly sitting back and letting Phil Cernera and Howard Funke, the Tribe representatives, perpetuate such a falsehood to further the Tribe's (and the Park & Recreation Department's) cause to force this ROW corridor into a trail??? The adjacent ROW landowners deserve an official, succinct clarification of this extremely important issue from the very agency who enforces and monitors the clean up. Why the silence from the EPA??? Why the mystery??? Why the appearance of collusion??? Why not some honesty right up front dealing with this vital point??? What is the unequivocal truth of this matter and why have you taken no action to publish the EPA's bottom line determination in this ROW contamination liability issue???

It seems to us the EPA is supposed to be an impartial, non-political Federal Government agency which does not take sides, but rather follows an agenda of adhering to the law and being truthful with the public (or is that a "Utopian concept" only?); your organization's job is to make sure pollution is cleaned up according to established specifications, observing the fundamental principles of honesty and fairness in all your actions. Yet, you have not come forward in good faith to set the record straight in this vital issue of who is liable for the pollution clean up on this ROW corridor despite all the contradictory statements presented on this subject by other agencies and private citizens. Your silence, in essence, supports the "intimidation tactic" used at every opportunity by Phil Cernera and others. No wonder some of our neighbors are accusing you (EPA), the Tribe and the Parks & Recreation Department of a "conspiracy" on this rails-to-trails

proposal. Where are your ethics and moral obligations to the public? What is the absolute truth about this issue? Please come forward and explain the law as it applies to this matter. Let's get this confusion resolved immediately so we can move on.

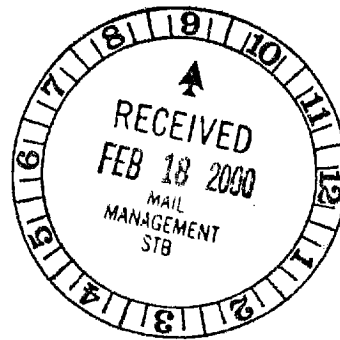
Sincerely,

cc: Gov Kampthorne  
Rick Cummins  
Phil Cernera  
Senator Craig  
Senator Crapo  
Representative Chenoweth

ANGELO B. BISSELL  
JOYCE L. BISSELL

ENTERED  
Office of the Secretary  
FEB 18 2000  
Part of  
Public Record

**L. Rogers Hardy  
Antonia M. Hardy  
13311 Perthshire Rd  
Houston, Texas 77079**



February 17, 2000

Mr. Vernon A Williams  
Surface Transportation Board  
Office of the Secretary, Room 711  
1925 K Street NW  
Washington, DC 20423-00001  
Att. Ms Phillis Johnson-Ball

U.S. Dept. of Justice  
P.O. Box 7611  
Environmental Enforcement Section,  
Environmental & Natural Resources Division,  
Washington D.C. 20044

Re: Public Comment to  
Draft Supplemental Environmental Assessment Docket No. AB-33 (Sub No. 70)  
Notice of Lodging of Consent Decree Case No. CV 91-0342-N-EJL

Dear Mr. Williams,

After thorough review of the Draft SEA, we firmly believe the six environmental conditions previously imposed have not been fully met, and environmental concerns regarding salvage activity raised during the course of the environmental review process have not been appropriately addressed or resolved. The Draft SEA is based on incomplete scientific data and inaccurate descriptions of the right-of-way between Harrison and Chatcolet. We firmly believe the enclosed pictures and facts are serious enough to warrant further investigation, sampling and analysis to mitigate potentially harmful environmental impact.

Specifically, the shoreline of the lake is incorrectly represented in the SEA where (pages 21-22) it says: "Approximately 80% of the line generally follows the Coeur d'Alene River and is mostly within the flood plain. The remaining portion of the line is adjacent to Lake Coeur d'Alene or in the upland areas of the Coeur d'Alene Indian Reservation. THIS IS NOT TRUE!! Much of the "remaining area" is not adjacent to the lake; it is, clearly, IN THE LAKE! Union Pacific changed the natural shoreline of the lake by building causeways which dammed up the natural shoreline and created now stagnant sloughs. These areas, once pristine ecosystems with frogs, fish, beaver, muskrat, deer, etc., are now polluted, and THEY HAVE NOT BEEN TESTED OR SAMPLED! Years of mining, ballast erosion, trapped farm run-off have caused these areas to die and to be replaced with swamp weeds. THESE AREAS, THROUGH WHICH THE CAUSEWAY/ROW RUNS, ARE PRIVATELY HELD LAND! The EE/CA referred to these areas, (from mile 30.5 to mile 23.4) as "natural resource/recreational use lands with no statistics available for population density." This erroneous description has not been changed, even though EVERY INCH OF THIS LAND IS PRIVATELY OWNED!

Additionally, Union Pacific and the governments involved in the proposed Mullan-Plummer trail have not done adequate sampling, particularly between Harrison and Chatcolet where there has been ONLY ONE sample site. Potentially damaged areas have not been properly identified. And although Union Pacific is to be held accountable for any new damage not already documented, once a trail is in, remediation will be extremely difficult. The existing pollution (determined by a single ballast sampling) will be covered by asphalt or gravel, and adjacent areas will not be considered. Currently, these areas have not been adequately sampled to determine how deep and how far the damage goes! Even the Corps of Engineers (SEA, page 4) says that "materials in the area through which the track passes should be tested prior to any attempt to remove it." THIS ISSUE OF INADEQUATE SAMPLING HAS BEEN IGNORED!

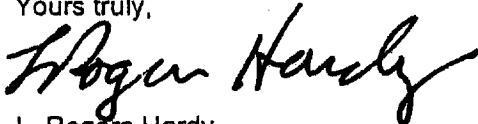
The SEA (page 24) states that "The data from the sampling was consistent with the premise that tailings used in the construction of the original ballast sections are essentially confined to the ballast sections." Since no sampling has been done of the subembankment/causeway, it is very likely that pollution exists there, also. No sampling has been done of the miles (60% of the rail line south of Harrison!) which form a causeway within the lake, all of which is composed of potentially hazardous rock! THIS UNSAMPLED ENVIRONMENTAL HAZARD HAS BEEN IGNORED!

Related to this issue, it is not clear to us why the ballast is only being removed in certain areas of the old rail line. The SEA says (page 27) that "ballast pollution is confined to the railbed EXCEPT where washouts have occurred." Yet, washed-out areas including Shingle Bay, O'Gara Bay and several other areas with UP created sloughs, have NOT been sampled! THIS IS CONTRADICTIONARY! Further, the SEA states that (page 33) all precautions will be taken to insure that dust, etc. from this removal will be contained, but they do not tell us how they propose to do this! Apparently, the UNTESTED, POTENTIALLY HARMFUL rock from the subembankment/causeway will REMAIN IN THE LAKE!

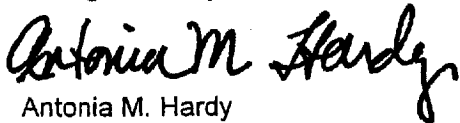
Section 2.2.5 of the SEA (page 25), entitled "Structures on the Right-of-Way," is, at best, confusing. The SEA states that the only remaining structures are "those associated with underlying land LEASES to private parties" or those constructed "illegally by persons not affiliated with the railroad." First, the homes south of Harrison which are in the ROW BELONG to people who have OWNERSHIP PATENTS for this land! Were it not for the "fiction" of railbanking, the ROW would revert to them. Some of these people have been paying taxes on this ROW land, which extends out into the lake, for over 50 years! (Union Pacific was granted an EASEMENT to use this land for railroad purposes.) And, there exists at least one pit toilet—built by the railroad at O'Gara Bay—which is CLEARLY an illegal structure! And, in years past when we tried to get the pit toilet and "illegal" float houses moved, we were told by railroad and state officials that these "squatters" were "grandfathered in," and they could not be forced to move! YET THE SEA DOES NOT ADDRESS THE VERY PERTINENT ISSUE OF RIGHTFUL LAND OWNERSHIP BUT, RATHER, SKIRTS THE ISSUE THROUGH RAILBANKING! We, the landowners, are very concerned that cursory or inadequate sampling of the ROW, including the causeways, will affect OUR OWNED, NOT "LEASED," property!

This letter represents the concerns of the Maucieri Trust, family-held acreage composed of approximately 600 acres of land homesteaded in 1910, as well as additional subsequently purchased adjoining parcels. This is the largest land tract at the south end of Lake Coeur d'Alene, and the ROW runs through the land from Shingle Bay at about MM27.2 down to below O'Gara Bay, at about MM 25.6. With almost 2 and ½ miles of lake frontage affected by your decisions, you can understand the immediacy of our concerns. We urge you to deny approval of the incomplete and inaccurate SEA document.

Yours truly,



L. Rogers Hardy



Antonia M. Hardy

Attached: Photographs Figures 1 – 10  
Previous Correspondence to Governments



Figure 1. The end of the Chatcolet Bridge Trestle and start of the East Causeway at mile 23.9. From here to Shingle Bay, at mile 27.7, fully 60% of the railbed is on a causeway in the lake, and does not "follow the east shore", as the EE/CA and Draft SEA state on page 21 state. This causeway, built by Union Pacific, has created environmental problems not tested or described in the EE/CA and Draft SEA.



Figure 2. The causeway leading from the swing bridge at mile 23.4. This bridge is one of the few remaining examples of this type of engineering monument left in the United States. The Tribe is reportedly considering building an arch span at this location, and possible destruction of the swing bridge, which is not discussed in the Draft SEA, and would be in violation of a previous agreement with the Idaho State Historical Society.

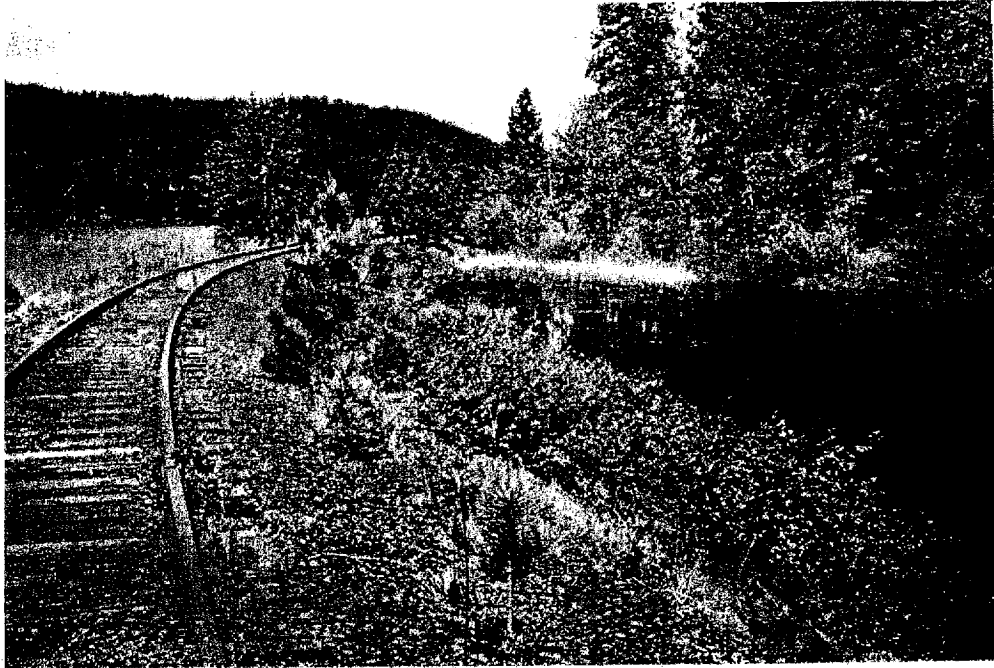


Figure 3. A portion of the lake (right) created by construction of the UPRR causeway at mile 24.91, is stagnant and separated from the open lake (left). This is near the take point for a contaminated well on the Walden's property. A large tie dump from which creosote has leached into the stagnant lake and ground water has been at this locale for many years. The EE/CA and Draft SEA do not accurately describe the natural, original shoreline along this segment. No testing of these stagnant portions is documented in the EE/CA or SEA despite our requests to do so.



Figure 4. A large slough (right) at mile 25.3, separated from the open Lake (left), was created by the UPRR construction of the causeway. Here the railbed clearly enters the lake, and is not "along the shoreline," as erroneously stated in the EE/CA and Draft SEA.



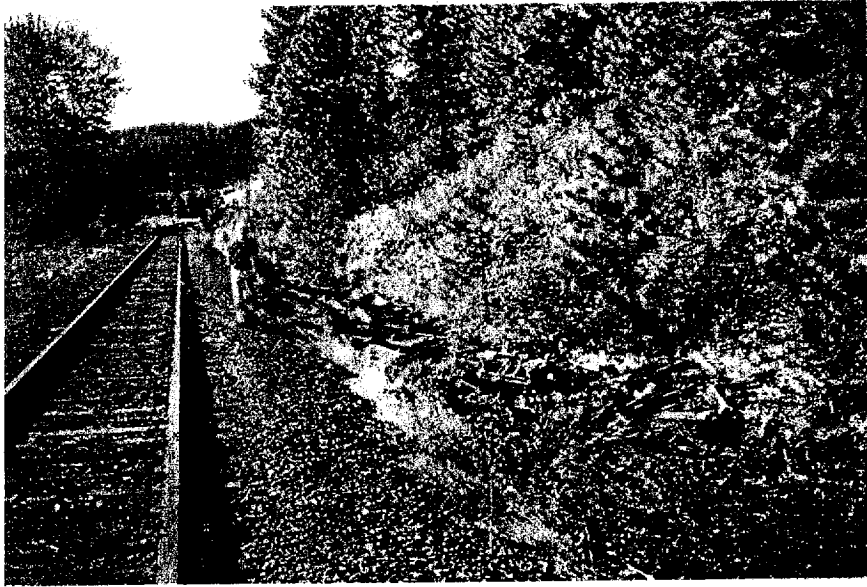


Figure 5. One of numerous large tie dumps (this one at mile 25.75) which are below lake level between the Union Pacific created causeway and the natural shoreline. Creosote has leached into the stagnant sloughs created by the causeway and into ground water at this locale and at miles 24.6, 24.91, 25.53, 26.38, 26.51, for many years. No testing of these polluted locations is documented in the EE/CA, but the stagnant water is a copper green. Our requests for testing these areas have been ignored.



Figure 6. A close up of the tie dump at mile 25.75 between the Union Pacific created causeway and the natural shoreline. The water is part of the lake, as it rises and falls with the level of the open lake on the other side of the causeway. The stagnant water is a copper green, but no testing of these polluted locations is documented in the EE/CA in spite of our repeated requests.



Figure 7. View from Harrison Flats looking south. The Union Pacific created railbed causeway is in the lower right. Here, it separates previously free-flowing lake water in O'Gara Bay, now choked with reeds and weeds on the left, from the open lake on the right. The EE/CA erroneously pegs the shoreline at the railbed, rather than at the natural lakeshore, which is now a stagnant slough.

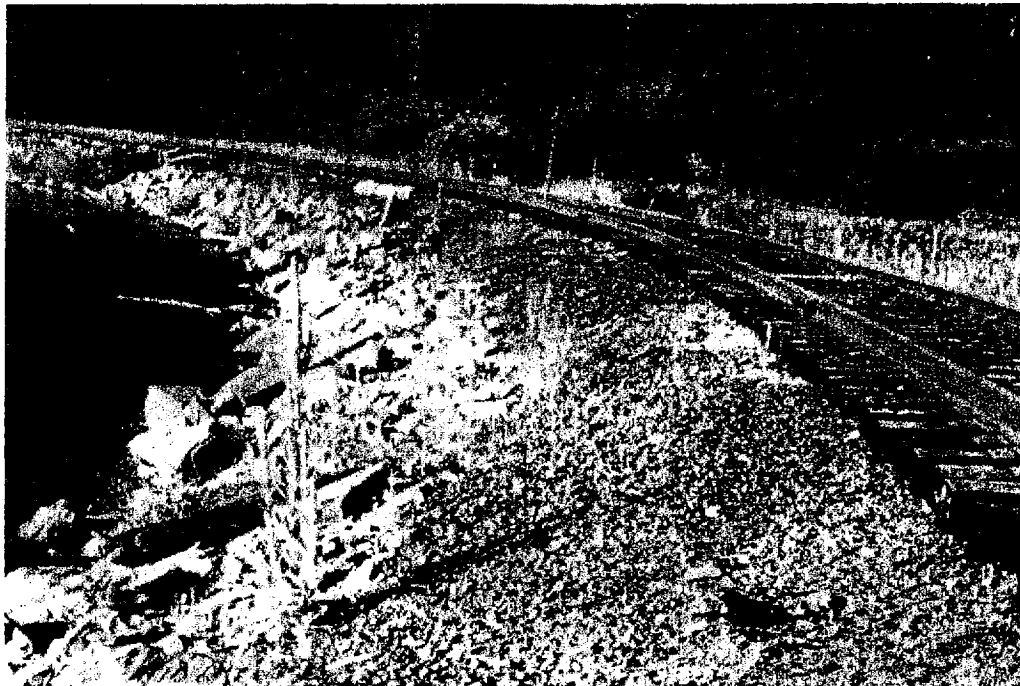


Figure 8. O'Gara Bay at mile 26.2 where the Union Pacific created causeway separates reeds and weeds (right) from the open lake (left). Unlike Shingle Bay, the causeway is not breached, and the bay is still a dammed up slough which, undoubtedly, has been polluted by the ballast. It used to be a vibrant ecosystem, before the causeway intervened, and no testing has been done here in spite of our repeated requests.

September 3, 1999

Surface Transportation Board  
Office of the Secretary  
Case Control Unit, Docket AB33-70  
  
1025 K Street, N.W.  
Washington, DC, 20423-0001

Mr. Thomas Greenland  
Environmental Counsel  
Union Pacific Railroad  
Company  
1416 Dodge Street  
Omaha, NE 68179

Re: Comments pertaining to Docket No. AB-33 (Sub -No. 70)

Urgent Attention Surface Transportation Board,

**UNION PACIFIC SHOULD NOT BE ALLOWED TO ABANDON!!!**

As a practicing geologist with over 25 years experience, I am contacting you with urgency during this comment period because none of my concerns expressed in over 40 letters, e-mails, and phone calls during the past year and a half have been addressed by the State of Idaho, the Coeur d'Alene Tribe, Union Pacific, or the EPA. I own a parcel within the Maucieri Land Trust, a property adjacent to the Wallace Branch Line ROW, from approximately mile 25.6 to Mile 27.2. After extensive review of the Engineering Evaluation/Cost Analysis (EE/CA), I urge your Board to deny abandonment of this line. The EE/CA clearly does not contain sufficient scientific foundation, and it is based upon a flawed rationale which cannot support proper environmental clean-up along the portion of the Right-of-Way (ROW) south of Shingle Bay by the eastern shore of Lake Coeur d'Alene, which includes my property.

First, I am very concerned about the water and bottom of Lake Coeur d'Alene in the ROW of the UPRR Wallace Branch between Heyburn and Harrison. This area is contaminated with mine waste, and the actions proposed in the EE/CA to support transfer of liability from UPRR to the State of Idaho do nothing to clean this up. For example, EE/CA documents significant mine waste contamination along the ROW, but there is no accompanying sample data for the waters and lake bottom to address a design for comprehensive clean-up. The EE/CA states on page 2: "At various locations along the rail line...there is evidence of spillage of these ores and concentrates (which have higher concentrations of lead and other heavy metals than the tailings and waste rock)"....and on page 12...."because some lakes and wetlands are not able to cleanse or restore themselves, they remain in impaired condition." The only two samples along this segment, at miles 27 and 29, confirm this, revealing high concentrations of lead. These data, however, are only from road bed ballast at the surface and less than two feet below the surface. Yet in reality, at least 90% of the subgrade embankment from Heyburn to Shingle Bay is under lake level in the form of causeways! These causeways form stagnant water areas at Shingle and O'Gara Bays, and at other areas referred to in the quotation from page 12. Concentrate documented to have spilled from the ore cars has without a doubt been washed into the sub-grade embankment by years of precipitation and seepage, yet this is not even mentioned in the report. The vast

from the ore cars has without a doubt been washed into the sub-grade embankment by years of precipitation and seepage, yet this is not even mentioned in the report. The vast majority of this contamination could now be within the sub-grade embankment below lake level, at lake bottom, or in groundwater. Yet, the EE/CA states in Appendix A, p. 36: "Below Harrison, removal of ballast, which is the predominant source of contamination in the area, as requested by the Coeur d'Alene Tribe, should resolve lead-health related issues in that segment of the trail. **THERE IS NO DATA MADE PUBLIC TO SUPPORT THIS CLAIM!** In addition, no careful assessment of the wetlands and surroundings has been made, and I consider this omission unconscionable. Union Pacific should not be let off the hook without completely restoring these areas which have gone from thriving, complex ecosystems into stagnant swamps over the past 40 years.

In addition, the EE/CA maps are incorrect. The shoreline of Lake Coeur d'Alene south of Harrison is not, as outlined on the map, on the west side of the railroad-made causeway. It is, rather, to the east, at the far edge of the Union Pacific-created contaminated sloughs. (This is the "natural" shoreline of the lake, and the causeway of the railbed cuts through the lake.) It appears that Union Pacific is being offered an easy way out of their clean up obligations with this abandonment/railbanking/rails-to-trails plan. Shingle and O'Gara Bays used to be open-lake pristine wildlife areas, supporting, deer, beaver, water fowl, frogs, muskrats, fish, the occasional moose or bear. Now, they are stagnant dumps, and the silence from lack of frogs is the deafening call sounding the end of life there. What about the cumulative effects of over a hundred years of creosote, pesticides, fertilizers, and other debris trapped within the UP causway area? What about the current proliferation of napweed and hawk weed which have, due to neglect by Union Pacific for 9 years, grown along the tracks and infested our lands?

Further, regarding the incompleteness of the EE/CA, page 28 states: "The proposed response actions contemplated in this EE/CA.... are not intended to address possible discharges of hazardous substances from the lateral zones of the ROW into wetlands or surface waters or to make such possible discharges meet water quality standards," and "....the proposed removal actions are not intended to address groundwater contamination." **WHY NOT, AND WHY IS UP BEING LET OFF THE HOOK THROUGH THE "FICTION" OF ABANDONMENT BY RAILBANKING WITHOUT BEING HELD ACCOUNTABLE?** Approval of abandonment, and issuance of a CITU will create a situation wherein a permanent trail will make proper clean-up virtually impossible.

In closing, I urge you to deny for the third (and, hopefully, final) time the issuance of a Certificate of Interim Trail Use (CITU). If you choose to proceed in spite of the protestations voiced by myself and the growing numbers of CART (Citizens Against Rails to Trails) members, I think you will find yourselves involved in a long and cumbersome legal battle.

Yours Truly,

## Hardy, Rogers

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**From:** Hardy, Rogers L.  
**Sent:** Monday, April 19, 1999 7:46 AM  
**To:** 'Browner, Carol'  
**Cc:** 'Clarke, Charles'; 'Villa, Clifford'; 'Hardys in Jakarta' (E-mail); 'Cernera, Philip'; 'Cummins, Richard'; 'Liverman, Earl'; 'Earl Liverman'; 'Greenberg, Frances'; 'Greene, Brenda'  
**Subject:** EPA Responsibilities in the Clean up the Wallace Mullan Branch Line, Idaho

Dear Ms. Browner,

I am writing to express my concerns about the EPA's role in the clean up of the Wallace Mullan Branch Line in Idaho. Specifically, my concerns are:

- There is insufficient scientific foundation and basic rationale supporting conclusions and recommendations in the Engineering Evaluation / Cost Analysis for the Union Pacific Railroad, Wallace-Mullan Branch, prepared under the guidelines of the EPA, dated January 15, 1999.
- The entire process is ill defined, and roles as well as accountabilities for Federal, state and local agencies are not clearly stated for the public.

Concerning the insufficient scientific foundation and basic rationale, the EPA endorses conclusions and recommendations on cleanup in the EE/CA even when no data is published on lead concentration analyses in the subembankment, or in waters and at the bottom of Lake Coeur d'Alene in the ROW between Harrison and Heyburn. This is especially disturbing after I read in EPA news release 98-61, dated November 30, 1998, that, in a project separate from the Wallace Branch cleanup, water and soil sample analysis concludes that Harrison Beach North requires further analysis for mine waste. Harrison Beach North is either in or very close to the Wallace Branch right of way. From Harrison and Chatcolet, the bulk of the right of way is on a causeway in the Lake. There have been many years for rain and snowmelt to wash documented mine waste into the lake, yet the EE/CA specifically states that addressing water contamination is beyond the scope of the study. In order to conduct a rigorous scientific study upon which to base conclusions and recommendations, I urge the EPA to sample, analyze, and publish data on lake waters and bottom along the right of way. If additional analyses have been made as part of this or any other project, they should be made public and incorporated into the EE/CA.

Also, I have read Surface Transportation Board Decision AB-33-70, dated October 31, 1996, denying the Rails-to-Trails Conservancy and the Union Pacific Railroad a certificate of interim trail use. In this decision, the STB is quoted as saying that the Union Pacific must comply with six environmental conditions and document them in an Environmental Assessment or and Environmental Impact Statement. The EE/CA makes no reference to these documents, and is insufficient to serve as one. If these studies were in fact conducted, they should be a matter of public record.

Concerning the EPA's role, the EPA, State of Idaho, and Coeur d'Alene Tribe issued a solicitation for comments on the clean up in January, with a deadline of two months. I submitted my comments to all three agencies on March 8. I now learn from Earl Liverman, the EPA's project manager, that the published replies will be over a month late, and any comment on the relation of the comments to the clean up process, and specifically the issuance of a CITU to the Union Pacific railroad, should be directed to the State or the Tribe. All indications to the public indicate that the railroad, the State, the Tribe, and the EPA are

brokering an agreement to build a bike trail over a heavily polluted right of way, with the primary interest being to minimize clean up costs to the railroad, and to promote tourist related business development for the State and Tribe. Also, the agencies involved are ducking responsibility by deflecting responsibility to other agencies. In short, we, the public, are being given double-speak answers or none at all.

This situation does not meet the standards to which the public should hold the EPA to. It is fully within our right to have the government agencies clearly define roles, accountability, and the process to us, the public. This is not happening. Rather, it appears that the State, the Tribe, and the railroad (with EPA support) are quickly and quietly pushing to get the CITU granted. This possibility releases forever Union Pacific from extensive clean up for rail related pollution. To me this is unconscionable, if not illegal. These issues must be addressed before issuance of a CITU.

Thank you for your consideration, and I look forward to comment on these specific issues from the EPA. Attached below is my prior email correspondence with the EPA.

-----Original Message-----

**From:** Earl Liverman [SMTP:earlliverman@dm1.net]  
**Sent:** Saturday, April 17, 1999 12:51 AM  
**To:** Hardy, Rogers L.; 'Liverman, Earl'  
**Cc:** 'Clarke, Charles'; 'Villa, Clifford'; 'Hardys in Jakarta' (E-mail); 'Cemera, Philip'; 'Cummins, Richard'  
**Subject:** Re: Next Steps on Wallace-Mullan ROW clean-up

Rog - I anticipate that the responsiveness summary will be completed within 30 days. Your question regarding the CITU is unclear. Please clarify your question and direct CITU-related concerns to both the Coeur d'Alene Tribe and the State of Idaho.

-----Original Message-----

**From:** Hardy, Rogers L. <rhardy@unocal.com>  
**To:** 'Liverman, Earl' <liverman.earl@epamail.epa.gov>  
**Cc:** 'Clarke, Charles' <clarke.charles@epamail.epa.gov>; 'Villa, Clifford' <villa.clifford@epamail.epa.gov>; 'Hardys in Jakarta' (E-mail) <hardyj@rad.net.id>; 'Cemera, Philip' <philc@dm1.net>; 'Cummins, Richard' <rcummins@idpr.state.id.us>  
**Date:** Thursday, April 15, 1999 10:12 PM  
**Subject:** Next Steps on Wallace-Mullan ROW clean-up

>Dear Mr. Liverman,  
> Regarding your email below, you state that we can expect a response  
>to our questions 'sometime during early or mid April'.  
>\* Do you now have a more precise time we may expect the response? We  
>consider all of our questions to be of sufficient public interest to have  
>responses published to them for the general public to read.  
>\* Also, what is the timing upcoming events toward the hearing to issue  
>a CITU, and what is the relation of the response to questions to the CITU  
>hearings?  
> We look forward to your prompt reply. Regards, Toni and Rog  
>Hardy (for the Maucieri Trust)

>

>

>-----Original Message-----

>From: Earl Liverman [SMTP:earlliverman@dm1.net]  
>Sent: Tuesday, March 09, 1999 11:51 PM  
>To: Hardy, Rogers L.  
>Subject: Re: PLEASE CONFIRM RECIEPT RE: Questions on the  
>Wallace-Mullan EE/ CATrail Proposal

>

>Greetings - I have received your fax, and you can expect a response  
sometime  
>during early or mid April. We have received several hundred comments  
>regarding the proposal; and most are directed toward the trail. Earl  
>Liverman

>  
>

>-----Original Message-----

>From: Hardy, Rogers L. <rhardy@unocal.com>  
>To: 'Liverman, Earl' <liverman.earl@epamail.epa.gov>  
>Date: Sunday, March 07, 1999 10:33 PM  
>Subject: PLEASE CONFIRM RECIEPT RE: Questions on the Wallace-Mullan EE/  
>CATrail Proposal

>

>>Earl,  
>> Please confirm that you received this before the deadline of March  
>>9th. Thanks, and we look to your published reply to the questions.  
>>Regards, Rog and Toni.

>

>> -----Original Message-----

>> From: Hardy, Rogers L.  
>> Sent: Monday, March 08, 1999 8:56 AM  
>> To: 'Cernera, Philip'; 'Cummins, Richard'; 'Liverman, Earl'  
>> Cc: 'Clarke, Charles'; 'Villa, Clifford'; 'Hardys in Jakarta' (E-mail)  
>> Subject: URGENT! RE: Questions on the Wallace-Mullan EE/CA Trail  
>> Proposal

>>

>> PLEASE NOTE THE QUESTIONS HAVE BEEN RENUMBERED FROM 23 ONWARD FROM AN  
>> EARLIER TRANSMISSION

>>

>> March 8, 1999

>>

>> URGENT! RE: Questions on the Wallace-Mullan EE/CA Trail Proposal

>>

>> To: Governor Kempthorne, State of Idaho Officials, EPA, The Tribe,

>>

>> In response to your invitation to comment , this letter contains  
questions

>> from Jean Maucieri, a Benewah Road resident and the largest South Lake  
>> Coeur d'Alene landholder, as well as Toni and Rogers Hardy, who are  
>> currently building a home on Benewah Road, and Jamie Hardy, Stacy and  
>> Scott Basko, and Candy Scalberg, all family members. We all represent  
the

>> Maucieri Trust, composed of land homesteaded in 1910 by Jean's parents,  
>> Bert and Hazel Selby, as well as lands subsequently bought and now  
>> included in the Trust. The parcel of land, 550 acres, is adjacent to the  
>> ROW from Shingle Bay at about MM 27.2 down to below O'Gara Bay, at about  
>> MM 25.6.

>>

>> These questions are spurred by urgent concerns expressed in our February  
>> 28, 1999 letter to you, which is attached. We expect direct answers to  
>> these 41 questions that follow, and for those answers to be made public as  
>> part of the process before approval of any clean up plans. (Page numbers  
>> refer to the EE/CA document.)

>>

>> 1. What are the rights of adjacent landowners on the functional ROW  
>> (described on page 62)?

>>

>> 2. What are the rights of adjacent landowners on the ROW off of the  
>> functional portion?

>>

*etc etc*

3/30/2000

UNITED STATES  
SURFACE TRANSPORTATION BOARD

Docket No. AB-33 (Sub-No. 70)

UNION PACIFIC RAILROAD COMPANY  
ABANDONMENT - WALLACE BRANCH, IDAHO

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UNION PACIFIC RAILROAD COMPANY'S RESPONSE TO CART COMMENTS ON  
DRAFT SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT

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The Draft Supplemental Environmental Assessment ("Draft Supp. EA") prepared by the Surface Transportation Board ("STB")'s Section of Environmental Analysis ("SEA") satisfies the requirements imposed by the United States Court of Appeals for the District of Columbia Circuit in State of Idaho v. Interstate Commerce Commission, 35 F.3d 585 (D.C. Cir. 1994), and the requirements of the National Environmental Policy Act ("NEPA") to the extent that those requirements are applicable.

Court's Requirements Are Satisfied

The scope of the court's remand in State of Idaho was limited to a requirement that the STB itself take "a hard look at the potential environmental consequences of salvage activity." 35 F.3d at 588. The court had found that the STB's predecessor, the Interstate Commerce Commission ("I.C.C."), had failed to take "a hard look" because it had "deferred to the scrutiny of others by authorizing salvage subject to conditions that require Union Pacific to consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions." 35 F.3d at 595. The court never reached the other criteria which the comments submitted by the Citizens Against Rails-to-Trails ("CART") assert apply. See Comments on Draft



Supplemental Environmental Assessment submitted by CART ("CART Comments"), pp. 5-7. Moreover, the court never found that the substance of the six conditions imposed by the I.C.C. were in themselves wrong; it only found that the I.C.C. could not delegate to other agencies or to Union Pacific the responsibility of determining whether the matters addressed in those conditions were properly resolved. 35 F.3d at 595-596.

The Draft Supplemental EA satisfies the "hard look" requirement. It reflects the SEA's own assessment of "the environmental impacts of going forward with salvage activities at this time, and how best to mitigate the potential impacts of track salvage." See, e.g., Draft Supp. EA, p. 31. Unlike the prior approach of the I.C.C., the SEA does not defer in the Draft Supp. EA to the scrutiny of other agencies or the regulated party. Instead, it makes an independent analysis of the information available concerning possible environmental impacts of proceeding with salvage or prohibiting salvage, imposes conditions to mitigate the possible impacts of salvage, and concludes that, if those conditions are implemented, salvage "would not have significant adverse environmental impacts."<sup>1</sup> Draft Supp. EA, pp. 30-32.

#### Other NEPA Requirements Are Satisfied

The SEA also addresses in the Draft Supp. EA the other three criteria which the court in State of Idaho indicated were part of a NEPA analysis for salvage, namely "(2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and

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<sup>1</sup> CART's implicit notion that the STB impose on Union Pacific a condition to clean up the right-of way as part of the salvage activity (see CART Comments, pp. 11-12, 17-19) was specifically rejected by the court in State of Idaho. Such a requirement is beyond the authority of the I.C.C. (now STB) and, as the court notes, is instead properly left to a civil action filed against Union Pacific like the actions filed by the Coeur d'Alene Tribe, and later the State and United States. 35 F.3d at 598.

identified, whether the agency made a convincing case that the impact was insignificant; and (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum." 35 F.3d at 595. Chapters 2 and 3 of the Draft Supp. EA review the environmental context of the Wallace Branch rail line and discuss the impacts of salvage activity on that environment. Chapter 4 identifies and discusses the relevant alternatives -- salvage or no salvage -- and the impacts of each on the environment. Together, these three chapters satisfy the first of these additional criteria. Chapter 5 addresses Union Pacific's compliance with the substance of the six conditions imposed by the I.C.C., and Chapter 6 discusses and recommends to the STB mitigation measures to be implemented by Union Pacific during salvage activities in order to ensure that possible adverse environmental effects are minimized. Chapter 7 concludes with a finding of no significant impact from salvage provided that the mitigation measures identified by the SEA are implemented. See Draft Supp. EA, pp. 38-39. These three chapters satisfy the last two of the additional criteria.

Moreover, the Draft Supp. EA is consistent with the types of analyses courts have found to satisfy NEPA. NEPA does not require that agencies reach a specific result or elevate environmental concerns over other appropriate concerns. Rather, it requires that agencies acquire information before acting and reach a decision after full consideration of all environmental factors. See, e.g., Kleppe v. Sierra Club, 427 U.S. 409, 96 S.Ct. 2718, 2730 n.21 (1976) (court reviews agency decision "to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.'"); Connecticut Trust for Historic Preservation v. Interstate Commerce Commission, 841 F.2d 479, 483-484 (2d Cir. 1988) (NEPA only requires agency to acquire and consider

information before acting; challengers need to point to a specific defect that undermines agency's conclusions) and cases cited therein. The SEA followed this process here as is reflected by the Draft Supp. EA.

#### NEPA Does Not Apply to Trail Conversion

The Draft Supp. EA need not address trail conversion. Issuance of a Certificate of Interim Trail Use ("CITU") or Notice of Interim Trail Use ("NITU") by the STB is a ministerial act for which the STB has no discretion. The pertinent provision of the National Trails System Act provides:

If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions . . . and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

16 U.S.C. § 1247(d) (emphasis added). See also 49 C.F.R. § 1152.29(b)(10)(ii) (1999) ("If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU."). Unlike the statute offering abandoned rail properties for public purposes, 49 U.S.C. § 10906 (now § 10905), which requires the STB to make findings that the rail property is "suitable for public purposes" (now "appropriate for use for public purposes"), 16 U.S.C. § 1247(d) imposes no requirement that the STB make any findings that the rail property is appropriate for trail use. Under 16 U.S.C. § 1247(d), the STB is required to issue the CITU or NITU once an application assuming responsibility is received from an entity identified in the statute and the railroad agrees to negotiate.

The courts have confirmed that NEPA does not apply to trail conversions. In Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990), the court agreed with the I.C.C. that "its role in a conversion proceeding is essentially a ministerial one in which the I.C.C. has no discretion to consider the environmental effects of conversion." 911 F.2d at 1295. The court confirmed the I.C.C.'s view that it had no power either to compel a conversion or to deny a conversion between willing parties because of environmental concerns. Under the language of the statute, "the I.C.C. has not been granted any discretion . . . to base its issuance of an NITU or CITU on environmental consequences." 911 F.2d at 1296. Under the circumstances, the I.C.C. has "no legal control" over a trail conversion project. 911 F.2d at 1295. In addition, the I.C.C. has no factual control over such a project because "the federal government does not in any way fund the conversion; and there is otherwise no federal involvement sufficient to turn what is essentially private, voluntary action into federal action." 911 F.2d at 1296. For these reasons, the court concluded that trail conversion is not a major federal action as is required to trigger application of NEPA's procedural requirements. "Because we think that the I.C.C. can exercise little discretion in issuing an NITU or CITU, no purpose can be served by requiring the I.C.C. to conduct an EA as to trail use in an abandonment proceeding." 911 F.2d at 1297.

#### Environmental Aspects of Trail Conversion Previously Addressed

As discussed above, the scope of this proceeding is limited to abandonment and salvage and NEPA does not apply to the ministerial act of issuing a CITU. Nonetheless, the possible environmental impacts from conversion of the right-of-way to a trail as well as a decision not to convert the right-of-way to a trail have been addressed in a manner consistent with NEPA. The question of conversion to a trail arises here in the context of a response action under the

Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq. ("CERCLA"). The United States Environmental Protection Agency ("EPA"), the federal agency having discretion with respect to a CERCLA response action decision, engaged in a NEPA-like process in selecting the CERCLA remedy for the Wallace Branch right-of-way. Among other activities, EPA acquired information about the site and the environmental and human health issues associated with the site, established goals for the response action, identified response action alternatives, identified possible human health and environmental impacts of the different alternatives, weighed and balanced the alternatives and their impacts, sought public comment on the alternatives, and after considering all factors selected a response action alternative which was protective of human health and the environment.

This process is reflected in the Engineering Evaluation/Cost Analysis dated January 15, 1999 ("EE/CA") and the Action Memorandum signed by EPA, the State and the Coeur d'Alene Tribe on October 13, 1999. Both of these documents were provided to the STB and were reviewed by the SEA before it prepared the Draft Supp. EA. In these documents, EPA expressly considered the conversion of the right-of-way to a trail as well as the absence of any such conversion in selecting a response action alternative. See, e.g., EE/CA Executive Summary, pp. 4-5; EE/CA, pp. 2, 25-26, 40-46, 59-66; Action Memorandum, pp. 9-10.

CART and others had ample opportunity to comment on trail conversion in the EPA process. Before a final remedy selection was made, and as provided by CERCLA and the National Contingency Plan, 40 C.F.R. Part 300, EPA made the EE/CA available for public comment. Many of those comments addressed possible environmental and human health impacts of trail conversion, and those comments as well as all others were considered by EPA as well as

the State and the Tribe in selecting the remedy. See Action Memorandum and the Responsiveness Summary attached thereto.

Respectfully submitted

for Tom E. Greenland  
Thomas E. Greenland  
24248 N. 81st Street  
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480-419-3938  
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*TEG*

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ATTORNEYS FOR UNION PACIFIC  
RAILROAD COMPANY

## **APPENDIX B**

UNION PACIFIC RAILROAD COMPANY

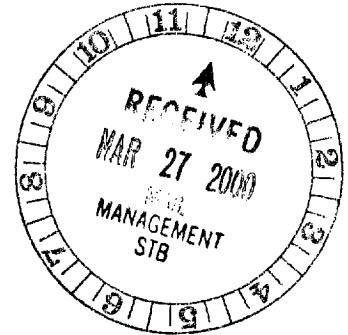
Law Department

Robert T. Opal  
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March 24, 2000



Elaine Kaiser  
Chief, Section of Environmental Analysis  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423

RE: Union Pacific Railroad Company - Abandonment  
Wallace Branch, Docket No. AB-33 (Sub. No. 70)

Dear Ms. Kaiser:

This letter is being submitted by Union Pacific Railroad Company ("Union Pacific") in accordance with discussions with counsel for the Surface Transportation Board ("STB") and in response to comments submitted by the Idaho State Historical Society ("SHPO") to the Draft Supplemental Environmental Assessment previously issued by the STB's Section of Environmental Analysis.

A Cultural Resource Reconnaissance Study prepared for Union Pacific by Renewable Technologies, Incorporated and submitted to SHPO identified six significant structures on the Wallace Branch line 50 years old or older. These structures are: a swing span bridge at Milepost 23.45; through truss bridges at Milepost 58.01, Milepost 62.14, Milepost 63.48 and Milepost 79.36; a passenger station building in Kellogg, Idaho. In its letter to Union Pacific dated February 18, 1999, SHPO indicated that these structures are individually eligible for the National Register, and that conversion of the rail line to a recreational trail would have no adverse effect provided that the historic bridges and features associated with the line are not removed or altered.

In response to the SHPO's comments, this letter states Union Pacific's intentions with respect to the identified structures. Following an STB decision authorizing abandonment and issuance of a Certificate of Interim Trail Use, Union Pacific will salvage the rails and ties from the line and begin conversion of the right of way to a recreational trail. In connection with this project, Union Pacific will not materially alter or otherwise adversely affect the historic integrity of the through truss bridges at Milepost 58.01, Milepost 62.14, Milepost 63.48 and Milepost 72.36, or the passenger station in Kellogg. The through truss bridges are integral with the trail and will remain in place. To facilitate their use as a component of the trail, decking and safety railing will be added to the bridges. The passenger station is owned by Union Pacific and currently is under lease to the City of Kellogg. Neither salvage nor trail construction will affect the passenger station and no change in use for this structure is contemplated.

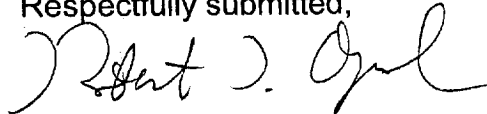


As to the swing span bridge at Milepost 23.45, Union Pacific and the Coeur d'Alene Tribe have been in consultation with the SHPO and expect to soon agree upon an alternative that will avoid an adverse effect for this structure, or if avoidance cannot be achieved to agree upon an appropriate mitigation plan. We look forward to working closely with the SHPO to determine the appropriate measures to take with respect to the swing span.

Based on the foregoing, Union Pacific respectfully requests that the historic preservation condition, as proposed in the Draft Supplemental Environmental Assessment, be modified in the following respects. Union Pacific would be required to retain its interest in and take no steps to alter the historic integrity of the swing span bridge at Milepost 23.45 until completion of the section 106 process of the National Historic Preservation Act with respect to the swing span. With respect to the remainder of the Wallace and Mullan Branch lines, the section 106 process is complete, and salvage of the remainder of the Wallace and Mullan Branch lines, consistent with the commitments of Union Pacific expressed herein relative to the truss bridges and conditions 1, 2, and 4 of Chapter 6 of the Draft Supplemental Environmental Assessment would be permitted to proceed upon issuance of the CITU and pending completion of the section 106 process for the swing span bridge.

An additional ten copies of this letter are enclosed for the Board's file.

Respectfully submitted,



Robert T. Opal  
General Commerce Counsel

RTO/nh  
Enclosures

cc: Susan Pengilly Neitzel  
Deputy SHPO and Compliance Coordinator  
Idaho State Historical Society  
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Boise, ID 83702

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